SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 27 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-562

LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY, and HARRY RUBENSTEIN, his attorney,

Petitioners,

v.

DICKSTEIN, SHAPIRO & GALLIGAN, now known as COLSON & SHAPIRO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

v.

DICKSTEIN, SHAPIRO & GALLIGAN, now known as COLSON & SHAPIRO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Louis Patlogan, a claimant and petitioner in the District Court and member of a national class of wholesaler-retailer druggists, on behalf of himself and all members of the class, and his attorney, Harry Rubenstein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the Alpine Pharmacy, Inc. consolidated cases (Court of Appeals Nos. 73-1305, 73-1306, 73-1308) on July 2, 1973, affirming in part and remanding in part the judgment of the United States District Court in the Southern District of New York entered on December 19, 1972.

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York, Alpine Pharmacy, Inc., et al v. Chas. Pfizer and Co., Inc., et al., ——F. Supp.—— (S.D.N.Y. 1972) is not yet officially reported. A copy of that decision and opinion is set forth in Appendix I to this petition, infra.

Petitioners, pursuant to 28 U.S.C. § 1292 (b) appealed from the orders and judgments of the District Court. On July 2, 1973, the United States Court of Appeals for the Second Circuit affirmed and remanded in part the ruling of the District Court. Alpine Pharmacy, Inc., et al. v. Chas. Pfizer and Co., Inc., et al., ——F. 2d—— (2nd Cir., July 2, 1973) not t officially reported; a copy of that decision and opinion is set forth in Appendix II to this petition, infra.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 2, 1973 (See Appendix II). No rehearing or extension of time was either sought or granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Specifically, the questions presented for review of this court are:

1. Whether by denying fees to an attorney for a member of a national class based upon pecuniary benefits achieved for that class as a result of that attorney's appeal in a class action, because the attorney represented only one party with a small money interest in the outcome, the District Court and Court of Appeals:

A. Acted to deprive absent class members of their right to property without due process of law, and

destroyed adequacy of representation which is an essential element of a class action;

B. Denied the right of appeal to a dissenting class member in a class action; and

C. Stifled dissent and future appeal in a class action.

2. Whether the Court of Appeals in a multi-class action by affirming a Court award of "reasonable" attorney's fees to an attorney for one class from the fund of another class, where such attorney had collected on his contingency fee contracts with clients of his own class more than two and one quarter million dollars and where the record revealed that this attorney's actions had involved delimiting the allocation to the class from which he sought this "reasonable" fee in order to increase the allocation to his class and thus to increase his own contingency fee because the settlement sum offered by the Defendants was unallocated to classes and required that all classes be included in the settlement:

A. Failed to apply the concept of the prohibition of a double counsel fee in derogation of equitable principles;

B. Induced confusion and potential lack of uniformity in the lower courts in applying the equitable principle prohibiting the receipt by an attorney of both a contingency fee from his own clients and a "reasonable" fee from the Court; and

C. Rewarded an attorney where his antagonistic, conflicting interests in the same litigation demonstrably had an influence upon his conduct — in derogation of equitable principles.

STATUTES INVOLVED

1. The Clayton Act, Section 4 (15 U.S.C. Sec. 15) provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. Rule 23—Class Actions (Federal Rules of Civil Procedure, 28 U.S.C.):

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted partially as Class Actions:
>
> (2) In any class action maintained under subdivision (b) (3), . . . (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

STATEMENT OF THE CASE

This action arises from anti-trust litigation involving price fixing conspiracies between several major antibiotic drug manufacturers. Criminal proceedings instituted by the United States government resulted in jury findings of guilt among the several corporate defendants. The civil class actions which followed were consolidated and assigned to the Southern District of New York by the multi-district panel. There were three classes of plaintiffs involved in the

litigation. One was the Government Entity Class (hereinafter referred to as the CCS Class). Another was the Consumer Class. There was also the Wholesaler-Retailer Druggist Class. These three classes were co-plaintiffs in a multi-class multi-district class action.

Attorney David Shapiro (of the firm of Dickstein, Shapiro & Galligan, now known as Colson & Shapiro) is one of the leading CCS attorneys, representing about twenty state and other governmental entities, with whom he had contingent fee contracts. Attorney Harry Rubenstein is a sole practioner representing only a single claimant from the wholesaler-retailer class, one Louis Patlogan. Attorney Rubenstein did not file an appearance until after consolidation of the various actions brought, and as a consequence was not a member of the Committee of Counsel for the druggist class; but nonetheless he joined the action under Rule 23 (c) (2) (C) of the Federal Rules of Civil Procedure and was thereafter very active in this litigation, seeking to protect not only the interests of his client but the druggist class in toto.

The defendants, in the hopes of settling with all CCS and Druggist Class litigants, offered $100,000,000 in an unallocated global settlement, which was later approved by the District Court. Because the settlement was unallocated, the co-plaintiff's interests were antagonistic with regards to division of the settlement, with each attorney seeking to get the largest portion for his particular class. Attorney Shapiro, who acted as go-between and negotiator between the defendants and the plaintiffs, sought to exclude the wholesaler-retailer druggist class from any part of the settlement, but the defendants would not allow any settlement which did not secure the agreement of all classes involved. Therefore, Attorney Shapiro, in order to obtain a larger amount of the settlement for the CCS class and thereby increase the value of his contingent fee, filed affidavits in the District Court from one William S. Apple,

which proposed that all druggists throughout the United States had a uniform mark-up of 66⅔%. On the basis of the affidavits, over the strenuous objections of Attorney Rubenstein, the druggist class was assigned a mere nuisance class allocation of $3,000,000 — reduced from a proposed allocation of $40,000,000. Attorney Rubenstein appealed this ruling and did succeed in acquiring a further accretion of $650,000 to the wholesaler-retailer druggist class by that appeal, which the same Court of Appeals in its opinion in that appeal, said would have otherwise gone to the CCS Class.

The actions of Attorney Shapiro, throughout the period of negotiation, were designed to reduce the recovery of the druggist class. In addition to the presentation of the aforementioned affidavits, Attorney Shapiro repeatedly misinformed the Committee of Counsel for the druggist class as to the status of negotiations with the defendants. For example, after their reduction to a nuisance allocation, the defendants proposed to place the full proposed settlement in escrow, interest thereon for fifteen months to accrue to the druggist class, thereby increasing their allocation to approximately $12,000,000. Attorney Shapiro, in relaying this proposal to the Committee for the druggist class, reduced this offer to twelve months interest. Agreement was thereafter reached between the plaintiff classes whereunder the druggist class accepted thirteen months interest on the entire fund, with an additional month's interest to accrue to that class if no final order were entered in this litigation by November 23, 1970.

Attorney Rubenstein filed his first appeal at this time in an attempt to return to the druggist class the funds which were lost due to the actions of Attorney Shapiro. Shapiro offered Rubenstein $650,000 for the druggist class (one month interest on the global fund) to forego filing his appeal; however, prosecution of the appeal by preventing a final order being entered before November 23,

1970 would lead to a minimum accretion to the druggist fund of that amount — while prosecution of the appeal held out the possibility, if successful, of adding a further accretion to the druggist class allocation. It was therefore Attorney Rubenstein's duty, in the interests of his class, to prosecute said appeal. Attorney Shapiro thereafter on November 10, 1970, filed motions in the Court of Appeals to have such appeal dismissed as frivolous and without merit in order to deprive the druggists class of the additional $650,000 interest — a motion which was fought by Attorney Rubenstein and which he succeeded in defeating, the Court finding the appeal to be legitimate and taken in good faith.

Through the above mentioned appeal, an increment of $650,000 was brought to the druggist class. The present action comes before the court on an issue of attorney's fees. The District Court refused to award any fees to Attorney Rubenstein for his diligence in pursuing the rights of his class in this matter and actually bringing a sizable monetary benefit to the class; and secondly, awarded Attorney Shapiro a fee of $350,000 from the druggist class fund — which fund Attorney Shapiro had done everything in his power to delimit — on the basis that he created the fund of $3,000,000. The Court of Appeals for the Second Circuit has upheld the actions of the District Court, and therefore upon these facts and issues Attorney Rubenstein appeals to this Court for the allowance of a writ of certiorari.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

BY DENYING FEES TO AN ATTORNEY FOR A MEMBER OF A NATIONAL CLASS BASED UPON PECUNIARY BENEFIT ACHIEVED FOR THAT CLASS AS A RESULT OF THAT ATTORNEY'S APPEAL IN A CLASS ACTION, BECAUSE THE ATTORNEY REPRESENTED ONLY ONE PARTY WITH A SMALL MONEY INTEREST IN THE OUTCOME, THE DISTRICT COURT AND COURT OF APPEALS:

A. ACTED TO DEPRIVE ABSENT CLASS MEMBERS OF THEIR RIGHT TO PROPERTY WITHOUT DUE PROCESS OF LAW, AND DESTROYED ADEQUACY OF REPRESENTATION WHICH IS AN ESSENTIAL ELEMENT OF A CLASS ACTION.

B. DENIED THE RIGHT OF APPEAL TO A DISSENTING CLASS MEMBER IN A CLASS ACTION; AND

C. STIFLED DISSENT AND FUTURE APPEAL IN A CLASS ACTION.

Rule 23 Of The Federal Rules Of Civil Procedure Establishes Due Process Requirements And The Device Of The Attorney Fee Granted From The Class Fund Is An Essential Element Of Due Process In Class Actions.

Due process protections are found in at least three separate provisions of Rule 23. It first is provided for in the prerequisites to a class action, 23 (a) (3) (4), which provide that:

> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

These sections were intended to protect the due process rights of the absent members, by insuring that all joined members of the class have the same interest in the outcome of the case as the absent members, so that any result beneficial to the joined members would be likewise in the interests of the absent ones. As an additional protection, (c) (2) (C) allows any member who does not request exclusion, and will therefore be bound by the judgment, to enter an appearance through his counsel so he can protect his own rights.

If the class is not properly represented, then any binding action against the class will act to deprive the absent class members of their property without due process of law. Courts have held that for the purpose of class actions, "the essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by the named parties." *Northern Natural Gas Company* v. *Grounds,* 292 F. Supp. 619 (1968). As stated in *Dolgow* v. *Anderson,* 43 F.R.D. 472 (E.D.N.Y. 1968):

> The Supreme Court has indicated that adequacy of representation, not form of notice, is the crucial consideration. See *Hansberry* v. *Lee,* 311 U.S. 32 (1940) ('this Court is justified in saying that there has been a failure of due process *only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it*') (Emphasis by the court) 43 F.R.D. at 500.

One procedure which has been adopted in class actions, first so that they might be brought at all, and second to insure due process, is the award of attorney's fees from the class fund. The attorney fee award is essential to the class action due to the very nature of the monetary interests of the claimants. Class actions were designed with the

small claimant in mind, the claimant who did not have a large enough monetary interest in the outcome to afford to hire his own counsel and pay the counsel fees for prosecution of the suit.

As a result, in the class action, the fee for the successful attorney comes out of the class fund which he was responsible for creating. Thus, the attorney fee acts as a means by which individual claimants can pursue their actions and by which the diligence and hard work of the counsel can be rewarded. Because no single member could afford to pay the attorney fees in such an action, the award of fees is essential to the initiation of the action itself and also to the continued diligence of the attorney in behalf of the class to insure that all actions are taken to preserve the rights of the class members, both present and absent. Since the attorney is the representative of his class in the most actual sense, and since all negotiations are carried on between counsel, the award of fees in a class suit is essential to the adequate representation of the class. This view was expressed by the Court in *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555 (2nd Cir. 1968):

> To be sure, an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and *generally able to conduct the proposed litigation*. 391 F. 2d at 562. (Emphasis added.)

and also in *Eisen* v. *Carlisle & Jacquelin*, 370 F. 2d 119 (2nd Cir. 1966), at 120 ("We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen.") The Court in *Dolgow* v. *Anderson* also spent much time considering this question and stated that the major incentive to forceful prosecution in a class action is the substantial counsel fee plaintiff's attorney believes he may be awarded if successful.

Since the attorney is the protector of the rights of the class members, it is therefore essential in a class action in order to protect the due process rights of the absent class

members, that the attorney be able to conduct the proposed litigation with the knowledge that if successful, he will receive compensation for his time spent and expenses. If an attorney should not be able to be compensated for his work, then any action taken by the attorney to protect the rights of the members of the class will be at the cost of the attorney, and thus act as a rein on the attorney's freedom of action and representation.

The Second Circuit Court Erred By Their Refusal To Award An Attorney, Fees Based Upon Pecuniary Benefits Achieved For A Class As A Result Of His Appeal In A Class Action, Acted To Deprive Absent Class Members Of Their Right To Property Without Due Process Of Law, And Destroyed Adequacy Of Representation Which Is An Essential Element Of A Class Action.

The United States Court of Appeals for the Second Circuit held that:

> (Attorney) Rubenstein represented a *single class claimant*, one Louis Patlogan, whose final portion of the settlement approximates $200. Patlogan never filed an individual action before the class consolidation; Rubenstein was consequently not a committee member. Thus, while Rubenstein continually appeared in the proceedings below, see Fed. R. Civ. P. 23 (e) (2) (C), *he rather clearly did so on behalf of his client, not the class* . . . Nonetheless, Rubenstein seeks over $75,000 in counsel fees and costs. He makes two arguments. The first involves the fact that he and others initiated the appeal from Judge Wyatt's approval of the settlement offer, which . . . added about $650,000 . . . to the wholesaler-retailer share of the final total. U. S. Court of Appeals, Second Circuit, Nos. 852, 853, 854, p. 4643 and 44 (September Term, 1971). (Emphasis added.)

The Court went on to state that it was true that the appeal did add funds to the class share, but that it "does

not necessarily follow that those who took the appeal must inexorably be the beneficiaries of consequent attorneys' fees."

This position is totally without support and contrary to the spirit and intentions of Rule 23. The Court is saying two things that are entirely contrary to the whole basis of class actions. First, the Court of Appeals says that Attorney Rubenstein represents one class claimant with only a small interest in the outcome. The basis of the class action suit is to enable individuals with small monetary interests in the total outcome to bring actions. To deny an attorney his fees because he does not represent a party with a large interest in the case is to set grounds for denying fees to all attorneys who represent clients with small interests, or in effect, all attorneys in the class action.

This directly affects the adequacy of representation, because although the class members joined are representative in interest to the absent members, their attorneys will be reluctant to press for their legal rights and expend moneys on appeals for which they will not get paid.

The Court of Appeals is also in grave error by holding that an attorney who files an appearance for an absent member and who dissents to an unfair settlement and appeals is doing so only for his client. He is doing so on behalf of his client, the other joined members of the class and the absent members of the class. What is the purpose of allowing a class member to appear if he cannot protect his rights in the action? The $650,000 won was a benefit to the whole class; the individual client received only a miniscule portion of that sum. If the Appellate Court's reasoning was correct, then Attorney Rubenstein would have ignored his best legal judgment and duty to the class, and only appealed if his client stood to gain great sums of money. If Attorney Rubenstein were to follow such reasoning, he would never have filed the appeal, and the absent members would have been deprived of the added $650,000 which Rubenstein brought to the class.

To insure the adequacy of representation in class actions, Rule 23 (c) (2) (C) must be interpreted as allowing any member who does not request exclusion, the right to protect both his own interests and the interests of the absent members of the class by taking an active part in the litigation, thus insuring due process to all members of the class. At this point, it should be stated that Attorney Rubenstein has already expended in this litigation over 1,000 hours in the District Court and in appeals and all of his Petitions, Motions, Memoranda and Briefs have always been filed on behalf of the national class of wholesaler and retailer druggists.

The Court of Appeals' reasoning that one who brought a benefit to a class by virtue of his actions is not entitled to a fee is absolutely contrary to the firm and established holding by this Court in *Sprague* v. *Ticonic Bank,* 307 U.S. 161 (1939), which holds unequivocally that one who brings a benefit to a class, pecuniary or otherwise, is entitled to remuneration for his actions. It is also contrary to the Court's holding in *Mills* v. *Electric Auto Lite,* 396 U.S. 375 (1969), that the equitable powers of the Court would permit the granting of counsel fees to one who establishes through a meritorious action, a benefit or fund for a Class, and that the formalities of litigation are unimportant — that it is immaterial whether that person acts as a member of a class, a representative, individually or as an intervenor. This holding by the Court of Appeals is totally damaging and destructive to the due process rights of the absent class members in future class actions, if it is allowed to stand as precedent.

The Court of Appeals also went on to state in their opinion on page 4644 that the continued prosecution of Rubenstein's appeal was not in the best interests of the class. This is first of all, a nonsense argument, and secondly should make no difference to the granting of fees for the benefits conferred in this case. The Court of Appeals decreed that Rubenstein should have accepted an offer of

$650,000 from Attorney Shapiro, the CCS Plaintiff attorney, to forego filing his appeal for reallocation of the fund. If successful, the appeal would have increased substantially the allocation to the wholesaler-retailer class fund. By filing the appeal, the wholesaler-retailer class was assured of receiving an additional $650,000, and therefore Rubenstein did not settle because he was not offered anything that he was not assured of procuring already. The Court of Appeals talks in terms of the success of the Rubenstein appeal overturning the settlement, which is complete nonsense, since the appeal was only aimed towards reallocation of the global fund, and not the adequacy of that fund and the criminal conviction of the defendants was overturned on such a minor technicality that there is no chance that they would have "walked away from the whole deal" as contended by the Court of Appeals. Indeed, the Defendants were just as eager as ever for a settlement of this matter.

With this in mind, the only legitimate basis which the Appeals Court could have been using to deny Rubenstein's fees was that he only represented a small claimant who appeared under 23 (c) (2) (C), and therefore had no rights to pursue the litigation to protect his interest or those of the absent class members. It is necessary for the Court to reverse this decision in order to protect the rights of the absent class members.

The Courts Of The Second Circuit Erred In Refusing To Award Attorney Fees Because By Their Action They Were Actually Denying The Right Of Appeal To A Dissenting Member In A Class Action.

The failure of the Court of Appeals to award fees to Attorney Rubenstein for monetary benefits brought to the class by virtue of his appeal is a direct denial of Ruben-

stein's client's right to dissent and appeal what he considers to be an unfair and unjust settlement of the case.

In *Ace Heating & Plumbing Company, Inc.* v. *Crane Company* v. *American Radiator & Standard Sanitary Corporation,* 453 F. 2d 30, 3rd Cir. at p. 33, the Court said:

> "Furthermore, court approval under these circumstances still may serve salutary purposes. It is possible that, within a class, a group of small claimants might be unfavorably treated by the terms of a proposed settlement. For them, the option to join is in reality no option at all. Rule 23 recognizes the fact that many small claimants frequently have no litigable claims unless aggregated. So, without court approval and a subsequent right to ask for review, such claimants would be faced with equally unpalatable alternatives—accept either nothing at all or a possibly unfair settlement. We conclude that appellants have standing to appeal in the circumstances here presented. Cf. 3B Moore's Federal Practice, Para. 23.80 (5) (1969.)"

The Court of Appeals is telling the class member that the costs and expenses of the appeal will not be borne by the class (who are the beneficiaries of the appeal, not only Rubenstein's client), so the only logical conclusion is that if the individual dissenting class member wishes to appeal, that he must then be prepared to pay the costs of the appeal himself.

This denies the small claim holder the right to appeal since his interest would never be monetarily large enough to justify the expense of an appeal which would at best only award the class member a fraction of the costs of such an appeal. The reasoning of the Court of Appeals to deny this right to a Rule 23 (c) (2) (C) member who joined the class to better protect his interests is an abomination of the law which the Supreme Court must not allow to stand as the law of the land. A better principle must be applied to insure that all class members have the right to dissent to a settlement and that their legal represent-

atives not be punished for exercising sound legal judgment on appeal and expending great sums in the successful protection of the class interests only to find that they cannot get reimbursed for the value of their services.

The Court Of Appeals' Decision On Fees Will Stifle Future Dissent And Appeals In Class Action Litigation By Class Members.

The failure of the Court of Appeals to award fees to the attorney for a dissenting class member on appeal will have the detrimental effect of stifling and inhibiting future dissent and appeals in class actions and generally deprive class members, both present and absent of their due process rights in class action litigation, since no attorney will be willing to expend his time and money on a costly appeal for which he cannot be reimbursed and it is improbable to assume that a sole dissenting class member will be willing or able to put forth the money necessary for the appeal. In *Ace Heating & Plumbing Company, Inc.* v. *Crane Company*, 453 F. 2d 30, 3rd Cir. 1971 at p. 35, the Court said:

> "We do not believe the trial court could deny compensation merely because a member of a class who opted in then opposed the settlement as unfair. Counsel was presumably advancing the legitimate rights of his client. It would chill challenges to the fairness of a settlement to say that such action results in forfeiture of the right to be reimbursed for compensable legal services."

The decision of the Court of Appeals as it now stands is detrimental to the rights of members in class actions and should be reversed and the principle should be reaffirmed requiring the granting of fees to an attorney for a member of a class whose successful efforts bring a monetary benefit to the class in a class action, so that attorneys will be able to properly represent absent members of a class and pursue their rights to the full extent of the

law. The history of progress whether it be in the legal field, the scientific field or any other field, has been the history of a long line of individuals with courage of their convictions who have not hesitated to dissent from the conventional wisdom and who have persisted until what was right was established as right. We are so much involved in an era of group dissent exemplified by actions outside of the law, that we do not recognize the much more serious danger to the narrowing of our individual liberties and that is the banishment of individual dissent made within the laws. Certainly this is an issue of such importance that it warrants the intervention of this Court and the recognition that he serves the legal order best and society best who persists in preventing an erroneous decision from becoming a legal precedent.

CONCLUSION

This Court should allow certiorari and reverse the Courts of the Second Circuit because the effect of their decision is to seriously undermine the basis and prerequisites to class actions and deny constitutional due process to class members with a small monetary interest in the outcome. Certiorari should be taken in this case under Supreme Court Rule 19 (1), (b) as the issue involved here is an important question of Federal Law which should be settled definitively by the Supreme Court, so that it ceases to be a continuing problem affecting the rights of numerous absent class members in class action litigation.

II.

THE COURT OF APPEALS ERRED IN AFFIRMING A COURT AWARD OF "REASONABLE" ATTORNEY'S FEES TO AN ATTORNEY FOR THE GOVERNMENT ENTITY CLASS FROM THE FUND OF THE WHOLESALER-RETAILER CLASS, WHERE SUCH AWARD AMOUNTED TO DOUBLE COUNSEL FEES AND REWARDED AN ATTORNEY WHERE

HIS ANTAGONISTIC CONFLICTING INTERESTS HAD AN INFLUENCE UPON HIS CONDUCT — ALL IN DEROGATION OF EQUITABLE PRINCIPLES.

This Court is being asked for the first time to consider the application of the double counsel fee prohibition enunciated in the case of *Powell* v. *Pennsylvania Railroad Express,* 267 F. 2d 241, 246 (3rd Cir., 1959) to a multi-class action where there was an unallocated global fund put up as settlement by the defendants with the various classes of plaintiffs competing for that fund. To date the application of the prohibition of the double counsel fee has been very simple and comprehensible in a single class action — that any counsel who intends to collect on his private fee arrangements cannot also be awarded "reasonable" fees by a court of equity.

The need for the application of the prohibition of the double counsel fee in a multi-class action involving competing classes for an unallocated sum could not be better demonstrated than in the instant litigation.

The law firm of Attorney Shapiro, representing some twenty governmental bodies in the city, county and state class, had contingent fee contracts with those governmental bodies on which they have already collected $2.25 million with the knowledge of the District Court. At the time of the global offer by the defendants, they advised Attorney Shapiro that they would not settle with his government entity (CCS) class unless the class of wholesale-retail druggists was included in the settlement. It follows, therefore, that Shapiro's law firm could not collect their contingent fee contract with their clients unless the wholesale-retail druggists were included in the settlement. It was to the self-interest of Attorney Shapiro that he reduce the allocation of the wholesaler-retailer druggists so that he could increase the allocation of the CCS class which he represented in order to increase the amount of his contingent fee with his clients in the CCS class.

In order to accomplish this, Attorney Shapiro undertook to obtain acceptances of the offer by those who were representing the wholesaler-retailer class and undertook the direct negotiations with the wholesaler-retailer class. Every action of Attorney Shapiro at the lower court, as established in the record, was therefore to delimit the allocation to the wholesaler-retailer druggist class and to injure that class rather than to confer a benefit upon it. For example, there was the matter of the false affidavits procured by Attorney Shapiro that asserted that the retail druggists had a uniform markup of 66⅔% and thus creating a basis for the District Court declaring them a nuisance class entitled only to a nuisance allocation. Then having accepted the responsibility of negotiating on behalf of the defendants with the representatives of the wholesaler-retailer class, he failed to notify these representatives of the expressed intent of the defendants, and misrepresented the defendants' position by stating that unless the wholesaler-retailer class accepted the three million dollars, the defendants would settle with the CCS class only. He also failed to communicate to the counsel for the wholesaler-retailer class that the defendants had offered to give them, in addition to the three million dollars, fifteen months' interest on the entire global fund, and instead told them that the defendants only offered twelve months' interest, all of which is verified in the record and in the District Court Opinion, along with other examples of Attorney Shapiro's actions to delimit the allocation of funds to the wholesaler-retailer class.

Thus the District Court's declared basis for granting the fee of $350,000 to the Shapiro firm — that he created the fund of $3,000,000 — is disproved on the record, because it was not the creation of a fund — it was the delimiting of a fund to benefit himself on his own contingent fee contract on which he and his law firm have already collected. In fact, the District Court's concept for the creating of the fund of three million dollars, namely that

Attorney Shapiro negotiated the settlement with the defendants, is erroneous, because he was only one of six CCS attorneys who assisted in negotiation of the global settlement and it should be noted that of those six attorneys, only Shapiro sought a fee from the fund of the wholesaler-retailer druggist class while the other attorneys relied solely upon their contingent fee contracts with their CCS clients. However, the District Court, in making this award to Shapiro and the Court of Appeals in affirming it, both rely upon the doctrine laid down in the landmark case of *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 59 S. Ct. 777, 83 L. Ed. 1184 (1939). *Sprague* does stand for the proposition that an attorney in class litigation is entitled to compensation for the creation of a benefit to a class. However, its application in the instant case is erroneous, as the facts clearly demonstrate that Attorney Shapiro conferred no benefit unto the wholesaler-retailer druggist class, but in fact worked towards an inopposite end. Shapiro had no choice but to include the druggist class in the global fund settlement and his efforts were expended in excluding that class as far as was possible.

The prohibition against collection of a double fee is an equitable one and under no circumstances should an attorney be allowed to collect both a contingent fee from his client and a reasonable fee from the court. *Powell* v. *Pennsylvania Railroad Express,* 267 F. 2d 241, 246 (3rd Cir., 1959). Applying this equitable principle to the facts in the case at bar is not so simple a procedure as in a single class litigation. Attorney Shapiro has and will collect contingent fees from his client. The larger the recovery of the CCS class, the larger will be his contingent fee. Conversely, the larger the recovery of the CCS class, the smaller will be the recovery of the druggist class. To allow a reasonable fee, therefore, to Attorney Shapiro out of the recovery of the druggist class will in essence amount to

a double fee. Shapiro has and will collect a contingent fee for his successes for his own class and a "reasonable" fee from the Court from another class for his injury to that other class.

Attorney Shapiro, having accepted the onus of negotiating directly with the Committee of Counsel for the wholesaler-retailer class had a duty to convey truthfully the intentions of the Defendants. The record reveals the opposite. Under those circumstances Shapiro and his law firm were in the position of representing in the same litigation conflicting, antagonistic interests. It has long been recognized that an attorney may not recover for legal services where he has represented conflicting or antagonistic interests in the same litigation. The usual consequence has been that he is debarred from receiving any fee no matter how successful his labors. Nor will the Court hear him urge or let him prove that in fact the conflict of his loyalties has had no influence upon his conduct; the prohibition is absolute and the consequence is a forfeiture of all pay. *Woods* v. *City National Bank & Trust Co.*, 312 U.S. 262, 61 S. Ct. 493, 85 L. Ed. 820; *Silbiger* v. *Prudence Bonds Corporation*, 180 F. 2d 917, 920 (2nd Cir. 1950); cert. denied, 340 U.S. 813, 71 S. Ct. 40, 95 L. Ed. 597 (1950); *Gesellschaft Fur Drahtlose Telegraphic M.B.H.* v. *Brown*, 78 F. 2d 410, 64 App. D. C. 357 (1935); *DeKorwin* v. *First National Bank of Chicago*, 155 F. Supp. 302, 306 (N.D. Ill. 1957). The record reveals that the conflict of Shapiro's loyalties had a definite influence upon his conduct, namely to increase his contingent fee while reducing the allocation to the wholesaler-retailer class.

The essence of the matter is that, whenever, in multi-class actions involving an unallocated global sum, the contingent fee of an attorney for one class is increased by his actions in lowering the allocation to another class, then his application for a fee from the class whose allocation he reduced, will be considered in the nature of a double

counsel fee and be denied; furthermore, his actions to delimit or reduce the allocation of the other class in order to increase the allocation to his class and his own contingent fee will be considered not a benefit to the other class, but a detriment, and the *Sprague* v. *Ticonic* doctrine, based on creating a fund or conferring a benefit on a class, will not be applied.

In addition, the attempts by the attorney to injure the other class by delimiting its allocation, will, under equitable principles, deny him a right to a fee from that class.

To grant a fee under any or all of these conditions would be to set a precedent for attorneys in multi-class actions to scramble for the position of negotiating directly with the defendants and excluding representatives of other classes from negotiating directly with the defendants, to the detriment of other classes.

To allow the Court award of "reasonable" attorney's fees to Attorney Shapiro from the wholesaler-retailer class fund is in derogation of well founded equitable principles. The potentiality for abuse in situations that may arise, and the indications of injury and damage to the wholesaler-retailer druggist class in the present action, compel this Court to flatly deny any such award. To do otherwise would only serve to arouse suspicion in the minds of the general public and foster less than exemplary conduct among members of the legal profession.

CONCLUSION

The Court should allow certiorari and reverse the Courts of the Second Circuit because the granting of a double counsel fee is against all equitable principles and constitutes a gross injustice to the druggist class; furthermore, certiorari should be granted to rectify a misapplication of the doctrine of *Sprague* v. *Ticonic*, supra; and finally certiorari should be granted under Rule 19 (1) (b) of the Supreme Court Rules to create uniformity in the law and rectify the confusion in the lower courts with regard to the award of double counsel fees in multi-class actions and because the question of the award of double counsel fees is a novel question of law which the Court should rule upon to prevent gross injustice and inequitable results in future multi-class actions.

For the reasons stated above, this Honorable Court should grant the petition for writ of certiorari sought herein by Louis Patlogan and Harry Rubenstein.

Dated September 25, 1973.

Respectfully submitted,

HARRY RUBENSTEIN,
11 South La Salle Street,
Chicago, Illinois 60603,

Counsel for Petitioners.

APPENDIX I

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK ..... ALPINE PHARMACY, INC. and other plaintiffs named in thirteen actions now consolidated, *Plaintiffs,* —against— CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN MATHIESON CHEMICAL CORPORATION, AND THE UPJOHN COMPANY, *Defendants.*	69 Civ. 559 and twelve other wholesaler-retailer actions now consolidated

WYATT, District Judge,

These are thirteen class actions, consolidated, brought by wholesalers or retailers for alleged violations by defendants of the antitrust laws in the sale of broad spectrum antibiotic drugs.

These is now before the Court an "Amended Second Stage Plan of Allocation" (the Plan) filed on January 26, 1972 by the Committee of Counsel appointed by the Court. With the help of this Plan, the Court must now direct the distribution of the settlement fund among members of the class, after allowances for counsel fees and expenses of counsel and after payment of all necessary administrative expenses.

1.

The history of these and related actions, including the terms of the settlement, is set out in an opinion approving the settlement. *State of West Virginia* v. *Chas. Pfizer & Co., Inc.*, 314 F. Supp. 710 (S.D.N.Y. 1970), affirmed 440 F. 2d 1079 (2nd Cir.), cert. denied under the name *Cotler Drugs, Inc.* v. *Chas. Pfizer & Co., Inc.* 404 U.S. 871 (1971).

By an order filed May 26, 1969, these thirteen actions were consolidated and it was determined that the consolidated action was to be maintained as a class action; the class was determined to be: "all those individuals, proprietorships, partnerships, corporations and other business firms and entities (other than hospitals or physicians) doing business in any of the States who purchased broad spectrum antibiotic products as defined in the complaints in such actions for resale at wholesale or retail." It was also provided in the same order that the plaintiffs in these actions and the class members would be represented by a Committee of Counsel ("the Committee"), namely, all counsel then of record in the actions consolidated. For convenience, the class will usually be referred to herein as simply "the retailer class" but it will be understood that the class also includes wholesalers.

By notice to class members mailed on or about June 19, 1969, members were given until August 16, 1969 to file claims; a claim form was annexed to the notice. The same notice advised class members that they could exclude themselves from the class by request in writing sent not later than August 1, 1969 and that, if they did not exclude themselves but preferred to be represented by their own counsel, appearances through such counsel could be entered not later than August 1, 1969.

The number of claims filed by wholesalers and retailers was 4,428 and the total dollar amount claimed to have

been paid for antibiotics purchased was about $375,700,000. About 1,500 members excluded themselves from the class.

A number of class members timely entered their appearances through counsel.

Motions were made by some class members for leave to enter their appearances through counsel after August 1, 1969. By several orders, these motions were denied.

Motions were made by some class members for leave to file claims after August 16, 1969. These motions were likewise denied except in very exceptional situations, as, for example, where a class member was not sent a notice because for some reason his name was not on the mailing list. See opinion and order filed February 11, 1970 on motion by class members represented by Emil Greenberg, Esq. See opinion and order filed February 13, 1970, on motion of Fay's Drug Company. See also opinion and order filed June 16, 1970 permitting the filing of certain claims from claimants located in the State of Washington, whose lateness was occasioned by advice of their counsel.

2.

The allocation of the global settlement fund offered by defendants produced controversy between the government entity class (which include the consumer class) and the retailer class. The government entity class proposed to allocate $3,000,000 of the settlement fund to the retailer class, which sum the latter class refused to accept. The impasse was removed by a compromise between the two class groups based on a concession by defendants. The defendants agreed to deposit at once the global settlement sum in escrow; the interest on this entire sum would accrue to the benefit of the retailer class until November 23, 1970 (a 13 month period) if by that date there was

a final order approving the settlement, and until December 23, 1970 (a 14 month period) if by November 23, 1970 there was no final order approving the settlement. The effect of this compromise was enormously to increase the amount to be received by the retailer class; another effect was to give the retailer class an additional benefit if there were no final order of approval by November 23, 1970.

The defendants on October 23, 1969 deposited $85,341,215 in escrow as the fund to settle all claims in all actions in which plaintiffs accepted the proposed settlement. Of this amount, $82,327,276 was at that time available to the government entity classes and $3,013,939 was available to the retailer class. It was provided in the escrow agreement that as of November 23 or December 23, 1970 (depending on the date when there was a final order of approval) the Escrow Agent should divide the Escrow Fund into two parts, one, Fund A, of $82,327,276 for the government entity classes and the other, Fund B, of the remainder of the Escrow Fund for the retailer class. The effect of this provision was to give to the retailer class all the interest earned on the entire Escrow Fund to November 23 or December 23, 1970, as the case might be. The Escrow Agent was The Chase Manhattan Bank (N.A.) ("Chase Manhattan").

3.

The Committee undertook the task of examining for correctness the claims filed by class members, including the many claims which alleged special damages. The Committee rented an office in Chicago for this purpose. By order filed February 9, 1970, the defendants were authorized to advance $18,000 to the Committee for expenses in processing the claims of class members; the advance

of $18,000 was to be repaid to defendants from the settlement fund (and has been repaid).

4.

Notice was given to class members of a hearing on March 24, 1970 on the question of approval of the proposed settlement. The hearing was duly held and on June 24, 1970 the Court filed an opinion approving the settlement (314 F. Supp. 710).

On September 29, 1970, an order and judgment was filed approving the settlement and dismissing the actions as against the defendants with prejudice.

There was no *final* order of approval by November 23, 1970 because Cotler Drugs, Inc. and Louis Patlogan, members of the retailer class, had an appeal then pending in the Court of Appeals.

According to a report of Chase Manhattan, dated December 7, 1972, interest on the entire Escrow Fund from October 23, 1969 to December 23, 1970 was $8,726,482.

The Escrow Agent, apparently on December 23, 1970, divided the Escrow Fund into Fund A and Fund B as of that date. Fund A should have consisted of $79,489,356 and Fund B should have consisted of $2,989,817 principal and $8,726,482 interest or an aggregate as of December 23, 1970 of $11,716,299. However this may have been done in fact, what should have been done is set out later in this opinion.

5.

At a hearing on November 17, 1970, the Committee made a report to the Court of the procedure which it was following and which it proposed to follow in examining and verifying the claims filed by class members. It was recognized that the appeal was pending but it was felt

that time spent meanwhile in examination and verification of claims would not be wasted. The Committee explained the concept of "national norms" (to be discussed later) and proposed that a questionnaire be sent to class members; this was necessary for application of national norms and otherwise for verification of claims.

By opinion and order filed January 28, 1971, the Committee was authorized to send the form of questionnaire and cover letter annexed to the opinion and order; these were directed to be sent to all class members whose claims showed antibiotics purchases of more than $40,000.

It may be noted that in examining the claims filed, the Committee applied a different method to claims over $40,000. As to claims stating purchases below $40,000, it was assumed that these were correctly stated, except for arithmetical errors which were corrected. This assumption was required by the evident practical exigencies. As to claims stating purchases over $400,000, the Committee verified accuracy by the application of national norms.

The mailing by the Committee to claimant class members was on March 9, 1971.

On March 29, 1971, the Court of Appeals affirmed the order and judgment approving the settlement (440 F. 2d 1079).

At a hearing on September 15, 1971, the Committee made a further report to the Court. Among other things, it was considered how to deal with those 549 class members whose claimed purchases exceeded $40,000 but who had not answered the questionnaire sent out in March 1971. The Court directed that these members be advised by the Committee that if they should fail to send in the questionnaires by a specified date (later fixed at October 28, 1971) sanctions might be applied. The Committee was

also directed to give other groups of claimants an opportunity to cure deficiencies.

6.

By order filed October 6, 1971, the Committee was directed to submit by November 15, 1971 a plan of allocation of the settlement fund among the members of the retailer class. By the same order, it was required that all applications for allowances for counsel fees and expenses be filed by November 15, 1971 (later extended to November 19, 1971).

On October 12, 1971, the Supreme Court denied a petition by Cotler and Patlogan for a writ of certiorari; the order approving the settlement become "final".

By order filed November 12, 1971, Mr. A. F. Donohue was appointed Special Master to assist the Court in the distribution of the settlement fund. He was authorized to employ counsel and did employ Davis Polk & Wardwell, Esqs.

A proposed second stage plan of allocation was filed by the Committee on November 15, 1971. Many applications for allowances were filed, some $5,375,000 being asked for counsel fees and some $135,000 for expenses.

The Court found the Plan "incomplete" and "inaccurate" and at a hearing on November 26, 1971 so stated (SM 2), giving the reasons therefor.

7.

On January 26, 1972, the Committee filed the "Amended Second Stage Plan of Allocation" which is now before the Court. With the Amended Plan, the Committee filed three "computer print-outs", entitled (1) "Report on Disallowed Claims" (more accurately, a report on claims proposed by the Committee to be disallowed), (2) "Report on Allowed Claims" (more accurately, a report on claims

proposed by the Committee to be allowed), and (3) "Report on All Claims", which is a combination of the first two reports.

The Plan proposes that each claimant class member—whether retailer or wholesaler—be paid that part of the net settlement fund representing the ratio of the antibiotic purchases of such claimant to the total such purchases by all claimants in the class. The dollar amount of purchases used for each claimant will be that allowed by the Court. It is not proposed that actual purchase amounts be proved but the Committee has examined each claim and a proposed disposition is made as to each claim.

The Plan, as has just been seen, disregards all claims of special damage.

As noted just above, the Plan proposes a treatment for each of the 4,428 claims filed. The *measure* of the participation of a claimant is the dollar amount of antibiotics purchased by that claimant. On the basis of the proposals of the Committee, responses of claimants, and otherwise, the Court must determine what claimed amounts are to be allowed.

The Plan proposes that 3,239 of the claims be allowed as filed, that is, that the dollar amounts of purchases be allowed as claimed.

The Plan proposes that 180 claims be entirely disallowed, that is, that these claimants not share in the distribution of the settlement fund. There are eight different reasons for a proposal of disallowance:

1. no dollar amount of purchases was stated;
2. the claim was not signed;
3. the claim was not timely filed;
4. the claim was not verified;

5. the claim was "cancelled" by the claimant (by which it is understood that the claim was withdrawn);
6. the claim duplicated another claim;
7. the form of claim indicated on its face that the member did not wish a share of the settlement; and
8. the claimant was not a member of the class.

A number of the claims proposed to be disallowed are said to have had more than one reason for disallowance. They are referred to as a category with "multiple deficiencies".

The Plan proposes that 1,009 claims be allowed in an adjusted amount.

One reason for adjustment was error in arithmetic. There are 369 claims in which adjustment for this reason is proposed.

Another reason for adjustment was timely amendment by the claimant. There are 21 claims in which adjustment for this reason is proposed.

The two other reasons for adjustment are somewhat related.

The Plan proposes that if the amount of purchases in a claim asserting purchases of more than $40,000 exceeds the applicable national norm, then the amount should be reduced to the national norm. The concept of national norms grew from the lack of any practical means to establish the accuracy of the purchase amounts claimed. The term "national norms" refers to the average ratios, based on available statistical data for wholesale and retail drug sales in the entire country, of antibiotic purchases to total prescription sales or to total sales.

It was determined that the national norms were as follows:

for retail and prescription drug stores, 15% of all prescription sales;

for chain stores, 5% of all prescription sales; and

for wholesales, 5% of total sales.

This determination was made by the Committee. In making the determination, the Committee relied on studies and advice by a number of experts, including Dr. James E. Gearien, Professor of Medicinal Chemistry and Head of the Medicinal Chemistry Department, College of Pharmacy, University of Illinois and Iver A. Iversen, a consulting biostatistician of Copeland Associates, Inc., Minneapolis.

Where the data submitted by a claimant shows that his claimed purchase amount exceeds the applicable national norm, the Plan proposes that there be allowed that purchase amount which results from application of the national norm to the total prescription sales or total sales of the claimant. There are 282 claims in which adjustment for this reason is proposed.

The final reason for a proposed adjustment is failure to answer the questionnaire. The national norms cannot be applied unless the claimant supplies data as to his total prescription sales or total sales, as the case may be. It would be unfair to reduce some purchase amounts of claimants on the basis of their answers to questionnaires and not to reduce the purchase amounts of claims who did not answer the questionnaire. The Plan proposes to reduce to $40,000 the purchase amounts of those claimants who did not answer the questionnaire. There are 337 claims in which adjustment for this reason is proposed.

8.

The Special Master filed a report, dated March 10, 1972, of recommended procedures for sending a notice to

claimant class members of a hearing on the Plan and a notice to each claimant class member of the disposition of such member's claim as proposed in the Plan. This report was accepted and by order filed March 14, 1972, the Special Master was directed to send the notices.

The two notices were sent out by mail on March 16 and 17, 1972. A separate notice was made up for each claimant, advising of the proposed disposition of the claim: allowed as filed, disallowed, reduced, etc. and the reasons where the proposed disposition was other than an allowance as filed. With this notice went a printed notice of a hearing to be held on April 14, 1972. The printed notice of hearing was the same for all claimant class members. (Affidavits filed April 18, 1972 establish the mailing of the notices.) Copies of the separate notices as sent to each claimant class member, advising of the proposed disposition of that class member's claim, were filed on March 20, 1972.

According to a report of the Special Master dated October 23, 1972, 260 notice envelopes were returned as undeliverable. New addresses were obtained for 79 of these and the notices were remailed. The remaining 181 notice envelopes were placed in the Clerk's file; of these 181, it appears that new addresses have been obtained for 90. The printed notice of the hearing advised claimant class members of the principal features of the Plan, referred them to the Plan itself, and gave some description of the applications for allowances for counsel fees and expenses of counsel. The notice advised that any class member would be heard at the hearing if a notice of intention to appear was filed by April 7, 1972.

There were written responses from class members to the notice of proposed treatment of their claims filed. These were reviewed by the Committee before April 14,

1972, and a written report with recommendations was submitted by the Committee to the Court in advance of the hearing.

9.

The matter of the claim of McKesson & Robbins Drug Company (McKesson) was considered and also the McKesson motion for leave to take depositions.

The application of Dickstein, Shapiro & Galligan for an allowance was considered. These attorneys were not counsel for any party to these actions but were counsel in many other related actions and were active in negotiating the settlement. Mr. Shapiro spoke in support of the application. There were a number of statements in opposition to this application, including a statement for the Committee.

The application for allowances of Mr. Berman was considered; Mr. Berman made a statement.

It was noted that Dene L. Lusby and Donald B. Brown had on April 12, 1972 filed a motion to strike a document (filed April 11, 1972) entitled "Response and Objections of the Committee of Counsel to the Petitions for Counsel Fees and Expenses Filed by Attorneys for Certain Class Members". Decision was reserved.

The application for allowances of Mr. Rubenstein was considered; Mr. Rubenstein made a statement.

Mr. Rubenstein made a statement in opposition to the application for allowances of the Committee.

It was noted that Messrs. Chapman, Loutos and Sloan, members of the Committee, had on April 11, 1972 filed a paper entitled "Answer" etc. to a petition of Levy and Erens for additional counsel fees, with a motion. Decision was reserved.

It was noted that Mr. Greenberg, for certain claimant class members, had filed an objection to applications for allowances for counsel fees.

Mr. Greenberg also appeared to oppose the treatment proposed in the Plan for nine claims represented by him. It appeared after discussion that one of these claims was not in dispute. The situation as to the other eight appeared to be this: their answers to the questionnaire were not sent to the Committee within the time fixed and thus the Committee proposed that the claims be reduced to $40,000. It appeared that the claimants had themselves timely executed answers to the questionnaire but that counsel had delayed sending the answers to the Committee. The Court, being unwilling to penalize the claimants for the delay of counsel, directed that the Committee re-examine the claims as if the answers had been timely received.

Mr. Soskin was heard on applications for counsel fees and on other matters.

Two class members, Domarco, Inc. and Benalen Corporation, appeared by their president, Mr. Lasken, and by counsel, Mr. Roschko, who, as to the general features of the Plan, objected to the disregard of special damages and to the inclusion in allowed purchases of purchases from defendants only; they also objected to the applications for counsel fees. Their statements have been considered. These two class members also filed written objections, including an objection to the treatment of their claims. Decision was reserved as to this.

New York Hotel Trades Council appeared by its attorney, Mr. Carlin, to object to the proposed disallowance of its claim. It appeared that the Committee believed that the claimant operated a health center or hospital and was not a members of the retailer class. It was represented

that this claimant (a joint union-employer project) bought antibiotics at wholesale and sold at retail; and that these sales were made in a "retail pharmacy operation" in connection with what was called a "medical center" but which had no beds and was not a hospital. Decision was reserved.

The claim of Economy Drug Store, 2874 West Broad St., Columbus, Ohio 43204, was considered. Counsel for this claimant had addressed the Clerk to object that this claim had not been dealt with by the Committee. Mr. Levy for the Committee arranged with counsel for claimant to bring the matter to the Court's attention. It appeared from an affidavit of claimant that a claim showing purchases of $37,000 was mailed on or before August 1, 1969 and a copy of the claim was submitted. It further appeared that no record of the Clerk or of the Committee showed that the claim was received. Decision was reserved.

The claim of Schumann Enterprises, whose counsel, Mr. Friedman, was present, was considered, with the participation of Mr. Levy for the Committee. It appears that two copies of the same claim were sent in and by administrative error were treated as separate claims and assigned separate numbers. When the duplication was discovered, one of the claims—R 2419—was cancelled, leaving claim R 3605 in effect. Later when answers to the questionnaire were returned by Schuman, they were by error put in the file of cancelled claim R 2419. The Plan proposes to reduce claim R 3605 from $672,257 to $40,000 for failure to return the questionnaire. When the errors were discovered, the Committee naturally changed its position and so advised the Court at the hearing. Decision was reserved.

The claim of Kersch Pharmacy was then considered. The claim was described in the Plan as for $39,600 and

was proposed in the Plan to be disallowed because, as explained at the hearing, the Committee believed, on the basis of an unsigned note in the file, that it had been withdrawn by claimant. It was represented that the claimant had never withdrawn its claim. The Committee changed its attitude and recommended allowance in the amounts of $39,999.99. Not realizing the discrepancy between the amount of the claim as filed, $39,600, and the amount recommended by the Committee at the hearing, $39,999.99, the Court responded, "All right". This claim will be discussed hereafter and the decision stated.

The claim of Gray Drug Stores in Cleveland was then considered. The secretary and general counsel of this claimant was in Court. It was represented that the purchases shown on the claim as filed were in the amount of $2,722,100. By a clerical error, the claim has been entered and dealt with as one for $2,722. The clerical error is obvious and it was directed that it be corrected.

The claim of M. Sobol, Inc. was then considered because a notice of intention to appear had been received by the Clerk from this claimant. In fact, no one appeared for the claimant. It is stated in the written objection filed that the total purchase amount claimed was $583,803.32 but the separate items for 1965 and 1966 included in making up this total were for some reason omitted on the claim form. The figures for 1965 and 1966 had been supplied in January of this year. It was directed that the claim be allowed as filed.

Dr. Giddings (claim R 3416) from Los Angeles then made a statement, generally objecting to the application of the Committee for counsel fees.

The claim of Sussex County Drug Co., Inc. of Newton, N.J., was then considered. Mr. McGovern, counsel to claim-

ant, was in Court. The Plan proposes to disallow the claim as late filed. Mr. McGovern explained that the claimant had timely given the claim to him as counsel but that, being then in the process of moving his office, he as counsel had caused the delay in filing the claim. Mr. McGovern also stated that the claim should be reduced so as to be "52 per cent less than the figures we supplied". The claimant was directed to submit answers to the questionnaire. Decision was reserved.

Mr. Meyers, representing Spartan Industries (Spartan), was then heard. Spartan filed a claim, R 3686, showing purchases of $693,600. Spartan failed to answer the questionnaire until very late. The excuse for the late answers was accepted.

The claim (R 0726) of Collins Drug Store, 924 North Marion Street, Lake City, Florida 32055, was then considered. The Plan proposes that this claim be disallowed for failure to show a dollar amount of purchases. An objection to this treatment having been received, the objection was overruled and the claim disallowed.

Mr. Anderson for McKesson noted its objection to the fee application of the Committee.

Mr. Erens, Mr. Schwartz, Mr. Wald and Mr. Sloan made statements in support of the Committee's application.

Mr. Shapiro made a further statement with reference to the application of his firm for an allowance of counsel fees.

10.

The Plan, including the method of distribution proposed therein, is generally approved.

Each claimant class member shall be paid from the net settlement fund that part of the net settlement fund rep-

resenting the ratio of his antibiotic purchases to the total antibiotic purchases by all claimants in the class. This makes it unnecessary to determine the actual damages of each claimant, a task which would be beyond the capacity of this Court to accomplish. As indicated, the distribution will be in proportion to the *purchases* of antibiotics by claimants.

The procedure followed by the Committee for the investigation of claims is approved.

The Committee examined each claim to determine whether it was timely filed, complete, signed, verified, mathematically correct, not a duplicate, and from a member of the class.

If the claim passed these tests and was below $40,000, the Committee proposed in the Plan that it be allowed as filed, without any test of the accuracy of the dollar amount of purchases claimed.

If the claim passed these tests and was above $40,000, then the Committee tested the accuracy of the purchase amount claimed. The test, as has already been seen, was the application of the normal ratio nationally of purchases of antibiotics to total prescription sales or (in the case of wholesalers) to total sales.

The application of the "national norms" required that data as to total prescription sales or total sales be obtained from each claimant for over $40,000. This was done by the questionnaire.

If a claimant has failed to answer the questionnaire, the Plan proposes that the claim be reduced to $40,000.

One aspect of this last proposal should be noted.

The effect of this last proposal is that the claims of some class members who answered the questionnaire are proposed to be reduced to less than $40,000 because the

application to their data of the normal ratio so requires. Had such members failed to answer the questionnaire, their claims would have been proposed to be reduced only to $40,000.

The Committee advises that the effect just noted occurs in the case of 62 claimants or some 1.4% of the total number of claimants.

This effect has caused the Court some concern but after much consideration, no better alternative has been found. One possibility considered was the disallowance of a claim in its entirety, if the claimant failed to answer the questionnaire. This penalty seems too severe, however, when it is remembered that those claimants for below $40,000 were not required to answer the questionnaire.

It is concluded that this proposed method, as well as the other proposed methods in the Plan, for treatment of claims will be and is accepted and approved.

The treatment of individual claims proposed in the Plan is approved except as to the specific claims decided in sections 11 and 12 of this opinion and order.

The claims listed in the "Report of All Claims" filed with the Plan are allowed in the purchase amounts shown in such Report under the column "Qualified Amt" except as to the specific claims decided in sections 11 and 12 of this opinion and order, which claims are allowed in the amounts stated in those sections.

The Committee is directed to file a list of all claims allowed in this opinion and order, showing as to each claim the claim number, the name and address of the claimant (using the latest information available to the Committee), the amount of the claim as filed, the allowed amount of the claim, and the percentage of all allowed claims represented by each claim. Such list should

be certified as correct by one or more members of the Committee.

Several requests have been made by attorneys that checks in distribution for their clients be mailed to the attorneys. The requests are proper and in any ordinary situation would be granted. This is not an ordinary situation. More than 4,000 checks must be prepared and mailed; computer techniques are employed; window envelopes will be used. it is not practicable to try to separate specific checks and to mail them to attorneys. These requests cannot be granted. The checks will be mailed to the payee class members at their addresses; where the only known address is that of the claimant's attorney, such address of necessity will be used.

11.

At the April 14, 1972 hearing, a number of matters were considered as to which decision was reserved. These matters will now be decided.

11a.

The McKesson Claim

McKesson (a division of Foremost-McKesson, Inc.) is a large wholesale drug distributor, one of the largest (if not the largest) in the country. It timely filed a claim showing antibiotics purchases of $40,500,000 in the relevant period; this represents a little over 13% of such purposes by all claimants as proposed by the Committee to be allowed.

There has never been any dispute about the dollar amount of relevant purchases by McKesson. The Committee, however, did oppose the McKesson claim because of the settlement of earlier litigation in Philadelphia and elsewhere between McKesson and two of the defendants here, Pfizer and Cyanamid. See *McKesson* v. *Pfizer*, 235

F. Supp. 743 (E.D. Pa. 1964). This litigation was eventually settled and McKesson gave covenants not to sue to Pfizer and Cyanamid.

The question of McKesson's claim was brought before the Court, by order to show cause obtained by the Committee and by notice of motion by McKesson, on November 8, 1971. At that time, the Court ruled that McKesson would be treated as any other member of the class, *except* that the dollar value of any benefit obtained by McKesson from the settlement with two of the defendants must be deducted from McKesson's distributive share of the settlement fund (SM 23, 24). The Court encouraged a resolution by agreement as to the dollar benefit to McKesson of its settlement with the two defendants (SM 24, 25). There having been no such resolution, on March 17, 1972 the Court referred the matter to Magistrate Schreiber to hear and report. When the Magistrate called the matter on April 6, 1972, the Committee and McKesson agreed on a settlement which was thus described in a paper filed on April 10, 1972: "a settlement which in effect is that the percentage distribution due McKesson & Robbins from the fund to be distributed to the class on distribution day will be reduced by 22%". Evidently the Court was advised in some way of this settlement because at the hearing on April 14, 1972 the Court described the agreement as one "to settle the matter by deducting 22 percent from McKesson & Robbins' settlement share" (SM 4). No settlement agreement was ever reduced to writing except for the one paper referred to above.

The settlement between McKesson and the Committee, from my knowledge of the situation, is found to be fair and reasonable and is approved.

The method of distribution which is being directed makes it difficult to carry out that settlement precisely

as it is formulated. The distribution is by percentage of allowed total purchases and if McKesson's percentage is reduced by 22%, the amount of such reduction must then be used to increase the percentages of the 4,428 other members of the class. While this could be done by the use of computer techniques, it seems awkward. The Court is advised that if the dollar amount of total purchases of McKesson is reduced by 24%, the effect will be substantially the same as if the distributive share of McKesson were reduced by 22%. Whatever the mathematical explanation may be, it appears that the effect of reducing the qualified purchases of McKesson by 24% is to reduce the distributive share of McKesson by about 22%. Accordingly, in order to carry out the settlement as described, it is directed that McKesson share in the distribution on the basis of purchases of $30,780,000 and the claim of McKesson is allowed in that amount.

11b.

Discovery Sought by McKesson

McKesson opposes allowances to the Committee for counsel fees in the amounts asked. In this connection, on March 15, 1972, McKesson served notice of the taking of the depositions of Mr. Levy and Mr. Schwartz and also served on them notices to produce.

On March 17, 1972, the notices of the taking of depositions were quashed after a hearing in open Court, but without prejudice to a motion by McKesson at the April 14, 1972 hearing for leave to take the depositions.

The motion was made by McKesson in a writing filed March 30, 1972, and was presented at the April 14 hearing at which time decision was reserved. The Court is persuaded that the depositions are unnecessary. The views of McKesson as to the allowances asked by the Committee are a matter of record and have been given careful con-

sideration in fixing those allowances. The motion of McKesson for an order authorizing discovery, etc., is denied.

11c.

Motion of Dene L. Lusby and Donald B. Brown

This motion, to which reference has earlier been made, is to strike a document entitled "Response", etc. filed by the Committee. The motion asserts that the Committee had not properly authorized such filing. Whatever the facts may be, there can be no harm in the Court considering the arguments in the "Response". The motion is denied.

11d.

Answer of James P. Chapman and others

This paper, to which reference has earlier been made, contains a motion "that the Court deny consideration" to a petition of Levy and Erens for additional counsel fees. Whatever the merits of that petition may be, there is no reason why it should not be considered. The motion is denied.

11e.

Eight Claims Represented by Mr. Greenberg

Following the direction given at the April 14, 1972 hearing, the Committee has re-examined the following claims as if answers to the questionnaire had been timely filed:

R 2397 Abramowitz Pharmacy
R 2574 Bement Pharmacy
R 690 Cunningham Pharmacy
R 1863 Kings Pharmacy
R 1844 Levin's Oceanside Pharmacy
R 2683 Shirol Pharmacy
R 2232 Solomon Schnapp
R 1846 Vita's Pharmacy

On the basis of a report to me for the Committee, the following of the eight claims are allowed as filed, with the allowed purchase amounts as indicated:

R 2574	Bement Pharmacy	$158,340
R 0690	Cunningham Pharmacy	71,500
R 1863	Kings Pharmacy	555,000
R 1844	Levin's Oceanside Pharmacy	107,028

On the basis of the same report, three of the eight claims must be reduced by application of the national norm formula. These three claims are as follows, with the allowed purchase amounts as indicated:

R 2397	Abramowitz Pharmacy	$ 77,145
R 2232	Solomon Schnapp	27,576
R 1846	Vita's Pharmacy	89,550

On the basis of the same report, one of the eight claims must be corrected for arithmetical errors and then reduced by application of the national norm formula. This claim is as follows, with the allowed purchase amount as indicated:

R 2683	Shirol Pharmacy	$ 31,582

11f.

Domaro and Benalen

Domaro, Inc. in claim R 2291 showed antibiotics purchases of $245,400.

Benalen Corp. in claim W 0031 showed antibiotics purchases of $207,700.

The Plan proposed that these amounts be allowed and they are hereby allowed.

The objections of these two class members that their alleged special damages should be allowed are overruled.

11g.

New York Hotel Trades Council

This claimant submitted a claim, RC 0125, showing purchases of $53,161. The Committee proposed disallowance because claimant was not a class member. On the representations made by counsel at the hearing, it is concluded that claimant is a class member and the amount of purchases is allowed for $53,161.

11h.

Economy Drug Store

It is concluded that the claim was timely sent and was lost in the mails. The claimant should not thereby be penalized. The claim will be accepted on the basis of the copy submitted. The Committee has assigned the number RC 0137 to this claim of Economy Drug Store, 2874 West Broad St., Columbus, Ohio 43204. The purchases of this claimant are allowed in the amount of $37,000.

11i.

Schuman Enterprises

The claim as filed was proposed in the Plan to be reduced to $40,000; this proposal was caused by administrative errors connected with the return of answers to the questionnaire. The present recommendation of the Committee, after discovery of the errors, is accepted and claim R 3605, Schuman Enterprises, 2830 Cleveland Avenue NW, Canton, Ohio 44709, is allowed for a purchase amount of $672,257.

11j.

Kersch Pharmacy

Further investigation indicates that the situation is more complex than appeared at the April 14, 1972 hearing.

Kersch filed a claim showing purchases of $39,600. When the Committee checked the claim, it was found that the figures had not been correctely added and the total amount of the claim should be $40,100. On the basis of this figure, Kersch was required to answer a questionnaire. This was not done, the reason being that Kersch was "now out of business". It was requested for Kersch that the claim be reduced to $39,999.99, thus avoiding the necessity for answering a questionnaire.

For some reason, probably human error, the Kersch claim was listed by the Committee as "cancelled". The Plan proposes, therefore, that the claim be disallowed.

It was objected for Kersch that the claim had never been "cancelled".

There is no reason, however, to permit the claim to be amended to reduce it for the purpose of answering a questionnaire. The claim will be reduced to $40,000 for failure to answer the questionnaire, giving the same treatment as in every similar case.

This claim is therefore allowed as follows:

R 1892 Kersch Pharmacy .....$ 40,000

11k.

Gray Drug Stores, Inc.

This claim was assigned number R 2374. It has been dealt with by the Committee as a claim for $2,722. This was a clerical error because inspection of the claim as

filed establishes that it stated purchases of $2,722,100. The claim is allowed in that amount. The address of the claimant is 666 Euclid Avenue, Cleveland, Ohio 44114.

11l.

M. Sobol, Inc.

This claim, W 0032, was proposed in the Plan to be reduced from $583,803 to $443,704. After further investigation, the Committee at the hearing changed its recommendation and, under all the circumstances, the claim is allowed in the amount of $583,803 as filed. The address of the claimant is 507 East 165 St., Bronx, N. Y. 10456.

11m.

Sussex County Drug Co., Inc.

This claim, LM 0091, stated purchases of $518,932. The excuse for late filing is accepted. The claimant through counsel asked at the hearing that the claims be reduced so as to be 52% less. Later the claimant by letter of counsel stated that the purchases should be $235,495. The claim is accordingly deemed amended so as to state purchases of $235,495. The Committee advises that application of the national norm will reduce the claim to $210,300. The allowed purchases of this claimant are therefore $210,300.

11n.

Spartan Industries

This claim, R 3686, for $693,600 was proposed to be reduced to $40,000 for late answers to the questionnaire. The excuse for lateness having been accepted, the claim is allowed in the amount of $693,600. The address of the claimant is 450 West 33d Street, New York, New York 10001.

12.

There were a number of class members who made written responses to the proposed treatment of their claims, which responses were not considered at the hearing because there was no appearance by or for the claimant and the matter was not otherwise brought to the Court's attention. These responses will now be considered and, having had the benefit of investigation and recommendation by the Committee, will be decided.

12a.

The Plan proposes that claims filed after August 16, 1969 be disallowed unless postmarked August 17 or 18, 1969, except that, if claims are postmarked August 17 or 18, 1969, and if other evidence shows that they were not in fact mailed before midnight on August 16, 1969, the Plan proposes that such claims be disallowed.

Some claimants have attempted to excuse the late filing of their claims. There must be an unusually strong showing for such an excuse to be accepted. Such a showing has been made in respect of the following late filed claims proposed in the Plan to be disallowed and which are allowed as filed:

LM 0040 Corner Drug
LC 0008 Michael A. Donatelli
LM 0055 Heck's Pharmacy
RC 0017 Teague Drug
LM 0053 Gem Rexall Drugs
LC 0001 Sol S. Turnoff Distributors
LM 0030 New York Towers Phcy
RC 0011 Royal Drug Co.
RC 0012 Victory Tampa Med. Phcy

Late filing is found excusable in the case of two other claims but errors of arithmetic in these claims require

that the purchase amounts be adjusted. They are allowed in the purchase amounts indicated, as follows:

RC 0015 Shopper's City .....$ 43,825
RC 0062 Joseph Raffa .....$ 4,577

Late filing is found excusable in the case of one other claim but the Committee advises that application of the national norm will reduce the claim. This claim is allowed in the amount indicated, as follows:

WC 0003 Frank E. Lentz Co. $129,362

12b.

Other claimants have attempted to excuse the late filing of their claims but their late filing is found not excusable. These claims, which are disallowed, are as follows:

RC 0016 Slaton's Pharmacy
LM 0085 King Drug Company
LM 0089 Polson Pharmacy, Inc.
LM 0090 Gaines Drugs & Sundries
LM 0092 Lynton Drug Co.
LM 0093 Valley View Drug
LM 0094 Romax Drug, Inc.
LM 0095 Colima Pharmacy

As to these claims, the Committee advises as follows:

"The objection filed on behalf of Slaton's Pharmacy states that the claimant is 'absolutely certain' that he was not late in filing. However, a review of his claim form shows that it was verified on September 13, 1969. In addition, the mailing envelope bears a postmark of September 15, 1969. The objections filed on behalf of King Drug, Polson Pharmacy and Gaines Drugs admit the late filing and offer no excuse. Finally, the objections filed on behalf of Lynton Drug, Valley View, Romax Drug, and Colima Pharmacy state that these claims were filed 'as soon as the forms were received'. However, a review of these claim forms indicates that, although they were signed on

July 30, 1969, they were not verified or mailed until September 8, 1969."

12c.

Failure to answer a questionnaire, as has been noted, caused the Committee to propose in the Plan a reduction of purchases to $40,000.

Four claimants asserted in their responses that no questionnaire was ever received. The Court authorized the sending of another.

One of these four claimants did not answer the questionnaire sent. This claim is reduced to $40,000 and allowed in that amount, as follows:

R 1366 Laswell Drugs

Three of these claimants answered the questionnaire.

In the case of one claimant, the Committee advises that application of the national norm will reduce the claim. This claim is allowed in the amount indicated, as follows:

R 2315 The Paine Drug Company $218,282

In the case of the other two claimants, the Committee advises that no reduction is indicated. These claims are allowed in the purchase amounts indicated, as follows:

R 0216 Crane Bros. Pharmacy .....$ 90,600
U 0038 Toller Drug Company $222,330

12d.

Other claimants answered the questionnaire but did so late, after the required time for answers. Based on investigation by the Committee, it is found that late filing of the answers is in these instances excusable.

In the case of one of these claims, errors of arithmetic must be corrected and the Committee advises that application of the national norm will reduce the claim. This claim is allowed in the amount indicated, as follows:

R 3333 Abraham Epstein .....$ 35,658

The other claims in this group are allowed in the purchase amounts indicated, as follows:

R 0832 Mackee Drug Company .....$ 42,179
R 2472 Capitol Drug Center .....$ 52,000
R 1928 Pappada Pharmacy .....$ 44,400
R 0225 Bonn Pharmacy .....$ 65,760

12e.

One claimant objected to the proposed reduction of his claim to $40,000 for failure to complete a questionnaire. The assertion by claimant is that he filed a questionnaire. The Committee advises that no relevant data, as required, was submitted by this claimant. This claim is reduced to $40,000 and allowed in that amount, as follows:

R 0855 Rothschilds Medical

12f.

Some claimants objected to reduction of their claims by application of national norms. For reasons already given, these objections are overruled. These claims will be reduced and allowed in the amounts indicated, as follows:

R 1687 Greenbelt Consumer Serv. $140,380
R 0070 Farmacia "Las Casas" .....$ 6,632
W 0022 Stanley Halbreich $105,271
R 1694 Bernard Friedman $127,344

12g.

In respect of two claims by the same claimant, responses by the claimant have led to investigation by the Committee and to a conclusion that excusable errors by the claimant require a change in the treatment proposed in the Plan.

The Committee advises that a retailer which operated four stores filed two claims for the two of its four stores which do the buying for the other two. The Plan proposes

a reduction in the two claims by reason of the application of national norms. After considering the response of the claimant, the Committee further advises:

> "In completing the Questionnaires, each of the claimant stores erroneously supplied sales data relating to their own sales. Sales data for the other two stores was not supplied. Because the sales data submitted would not sustain the amount of purchases claimed (when tested by the applicable national normal ratios), the qualified amounts for each of the two claimants were reduced. These claimants have now filed amended Questionnaires reflecting the proper sales figures for all four stores. The new sales figures, when tested by the applicable national normal ratios, sustain the original claimed amounts for each of the claimants."

Thees two claims are allowed in the purchase amounts shown in the claims, in the indicated amounts as follows:

R 1205 Casner Drug Co. $256,418
R 1206 Casner Drug Co. .....$ 58,278

12h.

One claimant, Giant Wholesale Drugs, Inc., objects to the application of the national norm for wholesalers. It appears that this claimant is a wholesaler; indeed, the objection states: 'This claimant is a wholesaler . . .". It is stated, however, that the sole customer of claimant is Giant Drugs, Inc., a retailer and that the two corporations are "related". How ever that may be, it was the wholesaler and not the retailer which filed the claim and the application of the national norm for wholesalers is appropriate. The objection is overruled and the claim is allowed for the purchase amount proposed in the Plan, as follows:

R 3078 Giant Wholesale Drugs, Inc. ..$ 68,777

12i.

Three claimants objected to the proposed disallowance of their claims but offered no evidence in support of their objections. The claims are accordingly disallowed, with indicated reasons for the disallowance, as follows:

R 2959 Alfred P. Lapin, M.D. (Not Class Member)
LC 0007 Dea's Leader Phcy (Not Verified)
R 0113 Pandrama Med. Center (Not Verified)

12j.

One claimant returned the notice of the proposed treatment of its claim. The returned notice bore a notation: "We drop all claims against defendants". Accordingly, this claim must be deemed withdrawn. The claim as filed is disallowed, as follows:

U 0005 McKnights Drug .....$ 0

12k.

One claimant initially filed a letter claim for damages of $1500. While claimant later stated that its antibiotics sales were $584,064, it insists that it wants no more than $1500 in damages. If the claim is allowed in the amount of $75,000, it is estimated that the distribution will be in the neighborhood of $1500. Accordingly, the claim is allowed in the purchase amount indicated, as follows:

R 3889 Dewberry Drug Co. .....$ 75,000

12l.

Based on reports of the Committee, the situation as to two claims is as follows. R 2639, Economy Chemists, Inc., and R 1338, Isidor Gade, are duplicate claims for the same retail drug store. The Committee could secure no explanation of the conflict. The Plan proposes that both claims be disallowed. Economy Chemists, Inc. made an objection to disallowance; Gade made no objection. The claim R 1338, Isidor Gade, is disallowed. The other claim is al-

lowed for the purchase amount shown in the claim, as follows:

R 2639 Economy Chemists, Inc. .....$ 26,400

12m.

One complaint asked that the claim be corrected. The claim as filed stated purchases of $150,250. The Plan proposes a reduction to $40,000 for failure to answer the questionnaire. The claimant states in a letter to its attorney that the decimal point in the claim was an error and that purchases should be $15,025. The claim is allowed for the purchase amount indicated, as follows:

R 2594 Hartley Chemists, Inc. .....$ 15,025

12n.

One claimant has pointed out what seems to be a clerical error. The claim as filed showed purchases of $6,713.95. The Plan proposes that it be allowed as filed in the amount of "$1,837". This is evidently a mistake. The claim is allowed in the amount shown in the claim, as follows:

R 3123 Van Wyke Hoke Helton .....$ 6,713

12o.

One claimant has pointed out that the Plan proposes to reduce the claim for error of arithmetic, whereas there was no such error. Investigation by the Committee shows that the claimant is correct and the proposal in the Plan is incorrect. The claim is allowed for the purchase amount indicated in the claim, as follows:

R 3063 Ken Miller's Rexall Drugs ....$ 30,798

12p.

There are some miscellaneous responses which should be noted.

An accountant for John Neary, said to be the owner of drug stores, asserted that a claim had been filed. The Committee advises that there is no record of any such claim and, after affording an opportunity to submit evidence that a claim was filed, no evidence was submitted and a statement is made that Neary "is unable to locate his copy of his claim."

Dr. Harold A. Gross wrote to inquire about "My claim for a refund". The Committee advises that there is no record of any such claim. In any event Dr. Gross would not be a member of the class.

There were inquires about claims from A. F. Salinas and for S. P. Drug Co. Inc. These inquiries seem to be whether they can now file a claim. There is no record that any claim has in fact been filed and it is too late to accept a claim now.

Those who made the inquiries described in this action will not participate in the settlement discussion.

13.

The amount deposited in escrow by defendants on October 23, 1969 was $85,341,215. The calculation of this amount is explained in the earlier opinion, 314 F. Supp. at 731. Of the amount initially deposited, $82,327,276 was for the government entity classes and $3,013,939 was for the retailer class. The latter figure is the $3,000,000 allocated to the retailer class in the "Alabama Plan" (314 F. Supp. at 728) and in the "Election by Defendants" (314 F. Supp. at 731) plus $25,000 for this class as a result of special negotiations (314 F. Supp. at 731) less $10,098.29 deducted for post-settlement expenses and $963 deducted for estimated future such expenses (a total deduction of $11,061.29 from $3,025,000, leaving $3,013,938.71, rounded off to $3,013,939 in some statements; see footnote on pages

3 and 4 of the "Election by Defendants to Proceed with a Modified Plan for Allocation").

The "Election" filed by the defendants specified how the $82,327,276 was proposed to be allocated among the government entity classes in each action (institutional purchases, vendor reimbursements, consumers).

By the time of the hearing on the fairness of the proposed settlement (March 24, 1970) and by the time of the filing of the earlier opinion (June 24, 1970), there were changes in the proposed settlement of government entity class claims. These changes were reflected in an "Addendum" to the Election of Defendants, which Addendum was filed January 20, 1970, and also in other papers submitted to the Court. These changes did not affect the retailer class but reduced the amount for settlement of government entity class claims to $79,557,269, the figure shown in the opinion (see 314 F. Supp. at 734).

This reduction came about because San Francisco and Los Angeles had withdrawn from the settlement and Santa Clara was discovered to have received in the Election by mistake an allocation from the settlement fund (see explanations, 314 F. Supp. at 732, 739). The amounts shown in the "Election" for these three entities was in the aggregate $2,814,316. At the same time it was found necessary to increase the allocation to Honolulu by $44,309 (see explanation, 314 F. Supp. at 738-39). The effect of these changes was a net reduction of $2,770,007 in the proposed settlement amount for government entity claims. After this reduction of $2,770,007, the settlement amount for government entity claims was $79,557,269. The $2,770,007 was not withdrawn from escrow; it had to remain under the escrow agreement but it became a "third fund", not available to the government entity classes or to the retailer class.

By an order filed September 17, 1970, and relating to the Escrow Agreement, the "maximum amount" of Fund A was fixed at $79,557,269, the same amount used in the opinion approving the settlement. In this same order, it was directed that the balance of the Escrow Fund in excess of the aggregate of Fund A and Fund B (the "third fund") should continue to be held under the Escrow Agreement.

Then on September 29, 1970, 52 separate orders and judgments were filed in the separate actions; 51 were filed in government entity actions and one was filed in this consolidated retailer class action.

The aggregate of the amounts allocated in the 51 government entity action orders was $79,489,356. This is $67,913 less than the $79,557,269 used in the opinion filed June 24, 1970. The difference of $67,913 is made up of additional advances by defendants for expenses of the settlement and chargeable to the government entity class settlement fund. This aspect of the matter is explained in an affidavit of J. Paul McGrath, sworn to August 20, 1970, annexed to a "Notice of Settlement of Orders" filed August 21, 1970.

The order and judgment filed on September 29, 1970 in this consolidated retailer class action provided that $2,989,817 should be the consideration from defendants for the dismissal of the consolidated retailer class action, plus the interest on the whole sum in escrow to the date specified in the Escrow Agreement. The $2,989,817 figure is less by $24,122 than the $3,013,939 available to the retailer class when the escrow was established. This difference represents further advances by defendants for expenses of the settlement and chargeable in the retailer class fund. The order and judgment described these as "advances made by the defendants for expenses to date of administering the settlement and which the Court finds

to be properly chargeable to the settlement fund". These advances (which included $9,000 advanced to the Committee) had increased by $34,122.09 over the amounts used when the escrow fund was established. If $24,122.09 be subtracted from $3,013,938.71, the result is $2,989,816.62 or, rounded off, $2,989,817, the figure used in the retailer class order and judgment of September 29, 1970.

The reduction by $67,913 of the settlement amount for government entity classes and the reduction by $24,122 of the settlement amount for the retailer class had the effect of increasing by those amounts the "third fund" mentioned above. This effect was not specifically noted or provided for in the September 29, 1970 orders and judgments.

Until December 23, 1970, all the interest on the Escrow Fund of $85,341,215 accrued to the benefit of the retailer class. Chase Manhattan, as Escrow Agent, reports that this interest was $8,726,482.

After December 23, 1970, it became the duty of the Escrow Agent to divide the Escrow Fund into three funds as of December 23, 1970. These three funds were provided for in the Escrow Agreement of October 20, 1969, as modified by the order filed September 17, 1970, and were as follows: Fund A (for government entity classes), Fund B (for the retailer class), and a third fund (later to be referred to as "Fund C").

From what has been set out above, it seems clear that the composition of these funds as of December 23, 1970 should have been:

Fund A	$79,489,356
Fund B	$11,716,299 the aggregate of $2,989,817 and the interest amount of $8,726,482 shown above
Third Fund	$2,862,042

The third fund is made up of $2,814,316 to cover withdrawals of San Francisco and Los Angeles and the elimination of Santa Clara less $44,309 to cover an increase in the allocation to Honolulu or a net transfer to the third fund of $2,770,007. To this should be added $24,122 expenses charged to the retailer class in reducing its fund from $3,013,939 to $2,989,817 and $67,913 expenses charged to the government entity classes in reducing their fund from $79,557,269 to $79,489,356.

If its records do not already do so, Chase Manhattan as Escrow Agent is directed to cause its records to reflect the establishment of the three funds as of December 23, 1970, in the respective amounts stated above.

After December 23, 1970, the interest on $79,489,356 accrued for the benefit of Fund A, the interest on $11,716,299 (on $11,707,299 after March 31, 1972; see next paragraph for explanation) accrued for the benefit of Fund B, and the interest on $2,862,042 (on $2,871,042 after March 31, 1972; see next paragraph for explanation) accrued for the benefit of the third fund.

By order filed March 6, 1972, the Escrow Agent was directed to deduct $9,000 from Fund B and to "credit that amount to the monies being held on account of actions pending against the defendants which have been brought by the City and County of San Francisco and the County of Los Angeles". The quoted words are an awkward description of the "third fund", already mentioned. The $9,000 deduction, made as of March 31, 1972, was the final reimbursement to defendants of the $18,000 advanced by them to the Committee and mentioned in section 3 above.

By order filed March 6, 1972, the Escrow Agent was directed to designate securities with a face value of $400,000 in Fund A and $100,000 in Fund B as securities comprising the "Administration and Distributon Fund"

from which expenses of administration and distribution would be paid. By the same order, it was directed that a "Checking Account" be opened with Chase Manhattan in the name of the Special Master and that securities in the Administration and Distribution Fund be liquidated from time to time as needed and the proceeds transferred to the Checking Account. Expenses of administration of the settlement have been in fact paid from the Checking Account and the amounts chargeable to the retailer class are hereafter set out.

The defendants apparently had some concern that the $67,913 difference, already discussed above in connection with the September 29, 1970 orders and judgments, had not been dealt with specifically in any order. This matter was considered at hearings on April 28 and May 1, 1972, and was the subject of an order filed May 2, 1972. This May 2, 1972 order referred to the excess in the escrow fund over the aggregate of Fund A and Fund B as "Fund C"; Fund C is thus the same as the "third fund" mentioned above. It was directed that the $67,913 and its proportionate part of the interest earned, namely, $5,477.36 (as of May 1, 1972) (a total of $73,390.36) should be transferred to Fund C. If the three funds were in fact properly set up as of December 23, 1970, this order was neither necessary nor appropriate.

Under the Escrow Agreement, after a "Final Order", the entire amount of Fund A was payable "to the respective representatives specified in the Final Order or to such other persons as the Court by order may direct". As to Fund A, the Court has by appropriate order directed that payments be made from Fund A in respect of all claims by all plaintiffs which were not claims for a class and these payments were made. The amount remaining in Fund A was, by order filed May 2, 1972, directed

to be transferred by the Escrow Agent to itself as Custodian under a "Custody and Investment Agreement" dated as of May 1, 1972 between Chase Manhattan and the Special Master. This amount, namely, $79,639,832.11, has been transferred and is now being held under the Custody etc. Agreement.

As to Fund B, the Escrow Agreement provides that from Fund B "shall be paid all amounts payable hereunder to the disbursing agent . . . in respect of the Wholesaler-Retailer class . . .". Fund B is still held under the Escrow Agreement and the order to be made hereafter will provide for the payment of all necessary expenses from Fund B and for the payment to class members of the net balance according to the method of distribution adopted herein, the Clerk of this Court in this respect acting as the "disbursing agent" by means of checks drawn on Chase Manhattan. The date for the determination of the net balance available for distribution is December 15, 1972.

Chase Manhattan, as Escrow Agent, reports that the amount of Fund B at December 15, 1972 was $12,585,018, consisting of $11,716,299 (the amount of Fund B at December 23, 1970) plus interest on that amount from December 23, 1970 to December 15, 1972, which interest was $977,719; the $12,585,018 is after deducting the $9,000 transferred to Fund C and the $100,000 transferred to the "Administration and Distribution Fund", as described above.

From the gross amount of $12,685,018 in Fund B on December 15, 1972 (including the $100,000 in the "Administration and Distribution Fund"), there will be deducted allowances to be made herein for counsel fees and expenses of counsel and there must also be deducted the necessary expenses of administration for which provision

is made herein. The net balance will be distributed to class members.

14.

There is a "Petition for Counsel Fees and Expenses Submitted by the Committee of Counsel for the Consolidated Wholesaler-Retailer Class". This was filed on November 18, 1971 and was fully described in the Schedule to the Notice of Hearing. There is a "Supplement to Petition for Counsel Fees and Expenses Submitted by the Committee of Counsel"; this was filed on March 3, 1972. There is a "Petition to Modify the Petition for Counsel Fees and Expenses Submitted on Behalf of the Committee of Counsel on November 19, 1971"; this was filed on March 3, 1972. These papers have been carefully studied and the appropriate factors have been considered; these factors have been noted in an earlier opinion (345 F. Supp. at 482-83) and need not be repeated.

There are a number of factors which suggest a generous allowance, the chief of which is the result accomplished (especially the increase by way of interest). There are a number of factors which suggest a modest allowance, for example, that the government and other plaintiffs pioneered the claims, that the considerable time spent in processing claims of class members did not require a high degree of professional skill, and that there was extensive duplication of effort (nine law firms on the Committee, two of which acted in the same action).

The list below shows the amounts asked for counsel fees, the amounts allowed for counsel fees, and the amounts allowed for expenses of counsel (these are the same as the amounts asked):

1972." Two documents are submitted; one is a letter dated January 24, 1972 which concludes that "the total due thru January 15, 1972, is $38,475.47"; the other is an invoice dated February 2, 1972 for $3,841.50 for the period ending January 31, 1972. The aggregate of the two amounts stated is $42,316.97. There is again no explanation except for a few words on page 36 of the "Petition" to which there is no cross reference in the "Supplement". To avoid delay in distribution, this item also must be taken on faith. The item—$42,316.97—is allowed. The address of Mid America Computer Corporation appears to be 640 North LaSalle Street, Chicago, Illinois 60610.

14d.

It is said: "Dr. Gearien has submitted his final bill for an additional $1000". A statement of Dr. Gearien dated February 2, 1972 is submitted for $1000 for "professional services". There is no statement that the bill is "final" nor the period covered nor the basis of compensation nor how much, if any, had previously been paid by the Committee. To avoid delay in distribution, this item also must be taken on faith. The item is allowed. The address of Dr. Gearien appears to be 833 South Wood Street, P.O. Box 6998, Chicago, Illinois 60680.

14e.

Under the caption "Defendant's Reimbursement—$9,000" appear these mystifying words: "These items total $71,091.47. Copies of the bills rendered in connection with these expenses are attached to this Supplement". No copies of any bills are in fact attached. A copy of an affidavit of Mr. McGrath, dealing with an item of $9,000 is attached. From the explanation in section 13 above, it will appear that this item of $9,000 has already been returned to defendants by a transfer to Fund C. It should

not be returned twice and this proposal of the Committee is disallowed.

15.

There were a number of petitions for allowances of counsel fees and expenses, separate and apart form those of the Committee dealt with in the section preceding.

15a.

There is a "Petition for Counsel Fee' of Dene L. Lusby, who states that he is a member of the Committee. He asks that the Committee be allowed 25% of the recovery and that he—as one of thirteen members—be allowed 1/13 of this sum. There is no showing of any contribution by Mr. Lusby to the result achieved. The Committee states that he was an "inactive" member and "consistently refused to take part in any of the activities". The Court is not aware of anything Mr. Lusby did. He was counsel to plaintiffs in an action commenced in the District of Maryland on March 14, 1969, more than a month after the defendants made public the settlement offer with which we are here concerned. It may be that Mr. Lusby has a good claim against client class members for whom he acted; nothing is here decided about that. There is no basis for any allowance from the class settlement fund and the petition is denied.

15b.

There is an "Application of Donald B. Brown for allowance for counsel fees and expenses". Mr. Brown was counsel to plaintiffs in an action commenced in the Central District of California on February 11, 1969, several days after the defendants made public the settlement offer with which we are here concerned. The situation as to Mr. Brown seems the same as that of Mr. Lusby discussed in section 15a above. Mr. Brown states that he spent 460

hours on this matter and has submitted a copy of his time records, the total of the time not being indicated and no attempt has been made to add the figures. Study of the entries in the time records shows that the time spent was for the benefit of the plaintiffs in the action commenced with Mr. Brown as counsel and was not for the benefit of the class. The Committee states that Mr. Brown "did not participate in the negotiations, the administration or any of the Committee's other work in these proceedings". The Court is not aware of anything Mr. Brown did for the class. It may be that Mr. Brown has a good claim against his client class members; nothing is here decided about that. There is no basis, however, for any allowance from the class settlement fund and the application is denied.

15c.

There is a "Petition for Attorneys' Fees and Costs of Attorneys for Cotler Drugs, Inc. et al". This petition is submitted by Edward A. Berman, Lawrence Walner, Lewis W. Schlifkin, Edward R. Johnston, Jenner & Block, and Bernard B. Brody, the address of all of whom is given as 134 North LaSalle Street, Chicago, Illinois 60602. Berman and Walner appear to have represented Cotler Drugs, Inc. and others in an action commenced as a class action on February 6, 1968 in the Northern District of Illinois. The action was later transferred to this Court by the Judicial Panel. Berman and Walner consulted the other petitioners from time to time, but the proliferation of attorneys cannot increase any allowance for counsel fees. The petitioners ask for $512,500 as counsel fees and $24,576.45 as expenses. Reference will usually be made to Berman and Walner but the other petitioners are included, to the extent appropriate.

These petitioners took no part in the negotiations which resulted in the February 6, 1969 settlement offer nor in

those which resulted in the creation in October 1969 of the escrow fund, and the great benefit to the retailer class thereby (see section 2 above and 314 F. Supp. at 730-31). Nevertheless, the activities of Berman and Walner, taken with the fairly early commencement as a national class action of the action in which they were counsel, may arguably have influenced the defendants in making the settlement proposals which were of benefit to the retailer class. This seems a factor suggesting some allowance to them.

The retailer class actions were consolidated and determined to be class actions by order filed May 26, 1969. The Committee was constituted by the same order and Berman and Walner apear to have been active in the work of the Committee until March 2, 1970, when, because of their disagreements with the other members of the Committee, they were by order "relieved temporarily of their duties as members of the Committee". There was no inquiry into the merits of the controversy. After March 2, 1970, Berman and Walner had nothing to do with the work of the Committee and did none of the work of handling the claims of class members. After March 2, 1970 (as well as before), Berman and Walner frequently appeared and expressed their views to the Court. None of their views was ever accepted. Their various motions and petitions were each denied as without any merit. The presentations by Berman and Walner were not frivolous, however, but were within the range of professional advocacy.

After this Court had approved the settlement and had filed orders and judgments on September 29, 1970, Berman and Walner took an appeal. This appeal was decided on March 29, 1971; there was an affirmance (440 F. 2d 1079). Berman and Walner then joined with another lawyer and filed a petition for a writ of certiorari which

was denied by the Supreme Court on October 12, 1971 (404 U.S. 871).

The appeals taken by Berman and Walner had the effect of delaying distribution of the settlement fund by almost exactly a year. Another effect was that, by delaying past November 23, 1970, a "final order" as that term was defined in the Escrow Agreement, interest for an additional month accrued to the benefit of the retailer class. This interest was in the order of $650,000. It was suggested to the Court of Appeals that this was the sole motive for the appeal and that damages and double costs should be imposed. The Court of Appeals could not "find sufficient evidence in the record to warrant such action" (440 F. 2d at 1092).

If the appeals taken by Berman and Walner had in fact conferred a $650,000 benefit on the retailer class, a serious factor in favor of an allowance on this account to them would be present. But this was not the situation.

Realizing that the effect of the appeal would be not only to give the retailer class $650,000 otherwise going to the government entity classes but would also cause substantial delay in distribution, counsel for the government entity classes offered voluntarily to turn over the additional month's interest (the $650,000) to the retailer class if the appeal were withdrawn. This offer was made before December 23, 1970. Such offer, with commendable candor, is set forth in this petition. But Berman and Walner insisted on prosecuting the appeal.

Under the circumstances, it seems impossible to find any benefit to the retailer class from the appeal of Berman and Walner. Indeed, it is arguable that the appeal exposed the retailer class to enormous risk were it to have been successful. The appeal was taken after the criminal conviction of defendant had been reversed (April 16,

1970). Had the Court of Appeals reversed the approval by this Court of the settlement, the defendants may very well have walked away from the settlement.

The petitioners state that they have spent 4317 hours on this matter. To a considerable extent, there appears to have been duplication, especially as between Berman and Walner themselves. But, even so, undoubtedly a large number of hours was spent by them on this matter. This Court cannot allow fees to them on any hourly basis; a substantial part of the hours were spent on matters for the benefit of their own particular clients. Petitioners are entitled to compensation for such services from their own clients; nothing herein is intended to affect this entitlement.

The efforts of Berman and Walner up to March 2, 1970 were of some benefit to the retailer class. The Court is unwilling to deny them an allowance because of their activities after March 2, 1970. The presentation by them in this Court of dissident views may have been a benefit to the class, even though the views were found without merit. An allowance will be made but the amount, based on the Court's assessment of benefit to the class, cannot, for the reasons given, reflect the hours spent or the professional competence shown.

The allowance to Edward A. Berman and the other petitioners named will be $75,000 for fees and $24,576.45 for expenses or a total of $99,576.45. Payment in this amount will be made to Edward A. Berman, 134 North LaSalle Street, Chicago, Illinois 60602, and Mr. Berman will be responsible for its further distribution to the other petitioners.

15d.

The firm of Dickstein, Shapiro & Galligan asks for an allowance of $750,000 as counsel fees, calculated at 25%

of the $3,000,000 initially allocated to the retailer class from the global settlement sum (as already seen the exact sum initially allocated turned out to be $3,013,939). The applicant firm will be referred to in short, for convenience, as "Shapir"; Mr. Stapiro took the leading part, at all times strongly supported by Mr. Galligan, and their firm used many others to help, including Miss Kram who, while not a lawyer, has done a great deal of non-legal but necessary work on the matter.

The background for the Shapiro claim is best understood by a reading of the opinion of this Court dealing with the fee petition of Harold E. Kohn, Esq.; this opinion is reported in 345 F. Supp. 454 (1972).

The unusual aspect of the present application is that Shapiro has not been counsel to any of the parties to these retailer class actions. Shapiro was acting as counsel to plaintiffs and class representatives in some twenty actions by government entities (often called "CCS entities" (city, county, state entities)) by the time the February 6, 1969 offer of settlement was made and afterwards the firm acted as counsel to a number of other such entities.

The negotiations leading to the February 6, 1969 offer of settlement have already been related in the opinion cited and also in 314 F. Supp. 710 (1970).

Primarily Shapiro was negotiating for his own clients, the CCS entities.

Defendants, however, were concerned with their exposure to claims of the retailer class and insisted that their settlement had to include such claims. The concern of defendants was founded in great part on *Hanover Shoe, Inc.* v. *United States Mach. Corp.*, 392 U.S. 481 (June 17, 1968).

Shapiro developed a theory to lessen such exposure by including claims of *consumers* among those claims to be compromised. This is specifically described in 345 F. Supp. at 468. The subject is discussed importantly in the opinion of our Court of Appeals affirming approval of the settlement. 440 F. 2d at 1086-1089.

The defendants nevertheless insisted that the claims of the retailer class would have to be settled along with all others, and their February 6, 1969 offer of $100,000,000 so provided. The offer, however, was global; that is, there was no allocation in the offer of any specific amount to the retailer class or to any other class.

It must be emphasized that Shapiro was the chief negotiator of the February 6, 1969 offer. By that time, a number of actions had been commenced on behalf of the retailer class but no counsel for the retailer class even participated in the negotiations leading to the February 6, 1969 offer. There had in fact been little, if any, activity in the actions on behalf of the retailer class.

After the February 6, 1969 offer had been made, Shapiro worked to obtain acceptances of the offer by those who were representing the retailer class. This work was successful. Shapiro also proposed that the retailer class be allocated $3,000,000 of the $100,000,000 offered. Shapiro was asked by counsel for the retailer class if the Shapiro firm would seek a fee from this allocation. It was stated by Shapiro that *if* the retailer class accepted the $3,000,000 allocation, Shapiro would not ask a fee against the $3,000,000. Counsel for the retailer class did accept the $100,000,000 offer but *did not* accept the $3,000,000 allocation.

In the settlement proceedings, there was a considerable controversy over the allocation to the retailer class. In-

deed, this was the principal point of the appeal (440 F. 2d 1079, cert. denied, 404 U.S. 871).

Shapiro negotiated with counsel for the retailer class, who were planning to file (and, in fact, did file) a plan of allocation of $40,000,000 of the $100,000,000 to the retailer class. Shapiro advised counsel for the retailer class that Shapiro would oppose the $40,000,000 allocation plan and, moreover, that if defendants adopted the $3,000,000 allocation to the retailer class, Shapiro "would then feel justified in requesting a counsel fee for [their] efforts in creating that fund".

Seven proposed allocation plans were filed with this Court. The retailer class in its plan asked $40,000,000 for its share; Shapiro in its plan proposed $3,000,000 for that class. Some of the other plans proposed that nothing be allocated to the retailer class.

Shapiro negotiated with defendants and with counsel for the retailer class to try to satisfy the retailer class.

It was out of these negotiations that the compromise was developed, already described in this opinion.

The theory of the present Shapiro application is that the efforts of Shapiro were responsible for the $3,000,000 allocation to the retailer class out of the $100,000,000 global offer. It is that sum of $3,000,000 against which this application is directed. Shapiro does not ask an allowance based on the increase above $3,000,000. Shapiro states that the enormous increase in the retailer class share from the compromise "was attributable, in large part, to the positions taken by the Wholesaler-Retailer Committee of Counsel after they entered the picture following the basic February 6, 1969, proposal".

It is certain that the efforts of Shapiro were largely responsible for the creation of the $3,000,000 fund allo-

cated to the retailer class. It is fair, just and reasonable that Shapiro receive an allowance from that fund; those who accept the benefit, namely, the retailer class, ought to contribute to allowances to counsel who made possible the benefit.

It is true that Shapiro did not represent any party to any actions for the retailer class, but this does not prevent an allowance to that firm from the retailer class fund. *Sprague* v. *Ticonic Bank,* 307 U.S. 161 (1939) seems authority for such an allowance. As Mr. Justice Frankfurter said in the case just cited (307 U.S. at 167):

> "But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation."

See also *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 389-397 (1970)

In making an allowance, the factors to be taken into account have been set out by me in 345 F. Supp. at 482-83. They need not be repeated.

There will be an allowance to the Shapiro firm of $350,000. Payment in that amount will be made to Dickstein, Shapiro & Galligan, 745 Fifth Avenue, New York, New York 10022.

15e.

There are further petitions for allowances of counsel fees and expenses, all of which raise the same issue and all of which must be denied for the same reason. These are petitions by the following:

Harry Rubinstein
11 South LaSalle Street
Chicago, Ill. 60603
Vorys, Sater, Seymour and Pease
52 East Gay Street
Columbus, Ohio 43215
Apter, Nahum & Lenge
(no address given; apparently
a firm in Hartford, Connecticut)
Icardi, Wombles & Livingston P.A.
P.O. Box 879
Winter Park, Florida
Ronnie A. Pruett
P.O. Box 830
Concord, N.C. 28025
Shapiro Schlissel Shiff
Beilly & Fox
225 Broadway
New York, New York 10007

These attorneys represented members of the retailer class who elected to rely on their own individually selected and retained counsel rather than to rely on counsel to the class representatives. Such, of course, is the right of a class member, recognized in Rule 23 itself in the provision that "any member who does not request exclusion may, if he desires, enter an appearance through his counsel" (Fed. R. Civ. P. 23(c)(2)(C)). Some or all of these petitioners entered such appearances. The interests of their clients varied from small as in the case of Mr. Rubinstein) to very large (as in the case of Vorys, Sater, Seymour and Pease).

These attorneys doubtless did able work for their respective clients and are entitled to be paid *by their clients* for their professional services. Their services did not

benefit the class as such and no basis is seen for any allowance to them from the class settlement fund.

It is suggested that if their clients must pay them and also must suffer the diminution of their distributive shares by the allowances to counsel for class representatives, then their clients will be paying twice for legal services.

In theory, at least, the suggestion has no basis. The allowances from the settlement fund are for services to the class as such. The payment by their clients to these petitioners are for services of benefit to the clients individually (rather than as class members).

To the extent that there is any duplication of services, it is a consequence of the desire of their clients to have individual representation. To enjoy such a benefit, it may be necessary to pay a price.

There is nothing to indicate that Rule 23 contemplated payment from a class fund to counsel for each class member who enters an appearance. Such payment would seem to be the poorest kind of policy. If counsel for every class member who enters an appearance could be paid from the class fund, such appearances would be greatly encouraged and depletion of the class fund assured.

For the reasons indicated, these petitions are denied.

16.

The Special Master, Mr. Donohue, in an affidavit sworn to November 30, 1972, asks for an allowance of $30,000 plus expenses of $662.92 (which includes an item of $341.12 estimated as the cost of postage in mailing the distribution checks to class members).

Counsel to the Special Master, Davis Polk & Wardwell, Esqs., have submitted an affidavit sworn to November 30,

1972 asking for an allowance of $12,500 plus expenses of $418.48.

An order was filed on November 30, 1972, requiring representatives of the retailer class in these actions to show cause on December 8, 1972, why the requested allowances should not be made. This order was served on all counsel of record.

At the hearing on December 8, there was no opposition to the requested allowances. Emil Greenberg, Esq., attorney for a number of class members, appeared and approved the applications. A letter was received from the Committee, dated December 5, 1972, stating that the Committee "had no objections whatsoever to the relief sought".

There will be paid to the Special Master $30,662.92 and to Davis Polk & Wardwell, Esqs. $12,918.48, as the allowances requested by them.

17.

Various other administrative expenses have been paid, and will be payable, from the settlement fund. These are described in an affidavit of the Special Master, sworn to December 12, 1972, and on file in these actions.

Ad Press was paid $1712 for printing the notice to class members of the April 14, 1972 hearing. It is estimated that $500 will be paid to Ad Press for printing an explanation to accompany the distribution checks.

APPENDIX II

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 852, 853, 854—September Term, 1972.

(Argued May 7, 1973 Decided July 2, 1973.)

Docket Nos. 73-1305, 73-1306, 73-1308

ALPINE PHARMACY, INC., an Illinois Corporation, MAGES PHARMACY, INC., an Illinois Corporation, JOSEPH MAGES d/b/a MAGES PHARMACY,

Plaintiffs-Appellees,

—v—

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN MATHIESON CHEMICAL CORPORATION and THE UPJOHN COMPANY,

Defendants,

and

COTLER DRUGS, INC., et al., LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY, DOMARO, INC., and BENALEN CORPORATION,

Plaintiffs-Appellants,

Before:

SMITH, MULLIGAN and TIMBERS,

Circuit Judges,

Appeal from order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* approving plan of distribution to claimants of

amounts paid in settlement of antibiotic multidistrict antitrust litigation and awarding attorneys' fees and expenses. Affirmed in part and remanded in part.

EDWARD A. BERMAN, Chicago, Ill. (Lawrence Walner, Lewis W. Schlifkin and Bernard B. Brody, of counsel), *for Plaintiffs-Appellants Cotler Drugs, Inc.*

HARRY RUBENSTEIN, Chicago, Ill., *for Plaintiff-Appellant Louis Patlogan, formerly d/b/a Patlogan's Western Pharmacy.*

MYRON ROSCHKO, Beverly Hills, Cal. (Roschko & Rosenson), *on the brief for Plaintiffs-Appellants Domaro, Inc. and Benalen Corp.*

JAY ERENS, Chicago, Ill. (Levy & Erens, Richard F. Levy and Howard A. Tullman, of counsel), *for Plaintiffs-Appellees Alpine Pharmacy, Inc. et al. by the Committee of Counsel.*

DAVID I. SHAPIRO, New York, N.Y. (James vanR. Springer, of counsel), *for Dickstein, Shapiro & Galligan.*

SMITH, *Circuit Judge:*

This is the latest, but we fear not the final, chapter in the ongoing saga of the antibiotic multidistrict antitrust litigation. The instant appeal is from an order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* approving a plan of distribution to claimants in the retail and wholesale druggist class, and awarding attorneys' fees and expenses. For the reasons given below, we affirm in part and remand in part.

4630

Since the background of the underlying litigation can charitably be described as complex, familiarity with the opinions of the district court and this court in *State of West Virginia* v. *Chas. Pfizer & Co.,* 314 F. Supp. 710 (S.D. N.Y. 1970), *aff'd,* 440 F. 2d 1079 (2d Cir.), *cert. denied,* 404

U.S. 871 (1971), will be assumed. For the purposes of understanding the issues involved in the present appeal, the following skeletal history should suffice.[1]

4631

The underlying suit involves antitrust allegations directed against five corporate defendants, concerning the marketing of broad spectrum antibiotic "wonder drugs." Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation consolidated a number of such actions in the Southern District of New York, assigning them to

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1. For the benefit of the uninitiated, we include this thumbnail sketch of the history of this litigation.

The genesis was in 1951, when the Federal Trade Commission began an investigation of the pricing policies of Chas. Pfizer & Co. in the marketing of a broad spectrum antibiotic. This investigation eventually led to an FTC complaint against five corporate defendants, which in turn led, in 1963, to a Commission cease and desist order. That order was vacated by the Sixth Circuit, 363 F. 2d 757 (1966) and the cause remanded to the Commission. The FTC again found antitrust violations, and this time the order was enforced, 401 F. 2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

In 1961, a criminal indictment was returned in the Southern District of New York, charging a number of individual and corporate defendants with Sherman Act violations. Judge Ryan later dismissed the indictment as to the individual defendants, 245 F. Supp. 801 (1965). After a motion to dismiss by the corporate defendants was denied, 281 F. Supp. 837 (1968), judgments of conviction resulted on jury verdicts of guilt. The convictions were reversed on appeal, 426 F. 2d 32 (2d Cir.), *panel opinion supplemented and order granting rehearing en banc vacated*, 437 F. 2d 957 (1970) *aff'd by an equally divided court*, 404 U.S. 548 (1972).

The civil complaints followed hard on the heels of the FTC and criminal investigations. Through a series of orders, the Judicial Panel on Multidistrict Litigation consolidated these actions and transferred them to Judge Wyatt. *See* 295 F. Supp. 1402; 297 F. Supp. 1126; 299 F. Supp. 1403; 301 F. Supp. 1158; 303 F. Supp. 1056; 309 F. Supp. 155.

State of West Virginia v. *Chas. Pfizer, supra*, involved a compromise of the class claims of wholesaler-retailer druggist class,

Judge Wyatt. The plaintiffs in these suits fall into a number of groups, but only three classes of claimants are relevant here: (a) city, county, and state government entities (the CCS plaintiffs), whose claims arise out of either the direct purchases of antibiotics or out of payments to or for the benefit of recipients of public aid; (b) wholesale and retail druggists (hereinafter, for simplicity, termed the retailer class); and (c) individual consumers.

Before the underlying action could proceed to trial, the defendants made a settlement offer in the amount of $100,000,000 as to the claims of these three groups. The CCS plaintiffs were to get $60 million; the remaining $40 million was to be divided between the claims of the retailer class and individual consumers. At the outset, many of the plaintiffs were of the view that the retailer class should get nothing at all, since the members of this class sold nearly all of the antibiotics which they purchased to consumers on the basis of cost plus a fixed markup, which re-

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the individual consumer class, and the government entity class. In *Hartford Hospital* v. *Chas. Pfizer & Co.*, 52 F. 2d 131 (S.D.N.Y.), *aff'd mem.* 448 F. 2d 790 (2d Cir. 1971), a compromise was approved involving private hospitals and Blue Cross Plans. *See also City of Philadelphia* v. *Chas. Pfizer & Co.*, 345 F. Supp. 454 (S.D.N.Y. 1972), involving the award of attorneys' fees in that compromise.

Those plaintiffs who continued to litigate their claims then had their actions consolidated by the Multidistrict Panel, 320 F. Supp. 586 (1970), and assigned to Judge Lord of the District of Minnesota, sitting in the Southern District of New York. Judge Lord then issued a series of orders governing these actions, reported at 333 F. Supp. 267-324 (1971), including one transferring the cases to Minnesota. We denied a petition of mandamus seeking to overturn that order, 447 F. 2d 122 (1971). *See also*, 449 F. 2d 119 (2d Cir. 1971) (denying a mandamus petition directed at Judge Lord's order of notice); 450 F. 2d 1119 (2d Cir. 1971), *aff'g mem.* 333 F. Supp. 296 (S.D.N.Y.) (Judge Lord's dismissal of various claims as barred by the prior judgment).

For the further adventures of the case after its transfer to Minnesota, *see* 456 F. 2d 532 (8th Cir. 1972) (denying motion to recuse Judge Lord); 456 F. 2d 545 (8th Cir. 1972) (granting mandamus petition directed toward discovery orders.)

sulted in their actually making higher profits as a result of the alleged antitrust violations. However, a "nuisance value" settlement of $3 million was eventually allocated to this class, in order to secure their agreement to the settlement. The remaining $37 million was to go to the claims of consumers.[2]

After a number of CCS plaintiffs chose to opt out of the "global settlement," the settlement offer was adjusted downward to $82,615,030.[3] The only group which raised serious objections to the final plan was the retailer class, which contended that it was entitled to the entire $37 million going to consumers. After extensive negotiations, the parties arrived at the novel solution of placing the entire settlement fund in escrow, with the interest on the account to accrue to the benefit of the retailer class. The escrow was to continue until there was a final order approving the compromise.

There was no such order until the end of the *State of West Virginia* case, which involved attacks on the settlement offer by some disgruntled members of the retailer class. By the time Judge Wyatt entered the order appealed from here, the total amount to be distributed to the retailer class, including both the basic $3 million share and the escrow interest, was $12,685,018.

It was this "pot" which Judge Wyatt sought to divide below, after making deductions for the expenses of admin-

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2. Individual claims totaling about $16.5 million had been filed by some 38,000 consumers. After these were settled, the balance of the $37 million was to be retained by the attorneys general of the various plaintiff-states, as representatives of the individual consumers, to be disbursed in whatever manner the district court directed. *See* 440 F. 2d at 1083-4 and 1089-91.

3. No adjustment was made for wholesaler-retailers or for consumer class members who chose exclusion. 440 F. 2d at 1084.

istration, counsel fees and expenses of counsel. Before proceeding to the merits, we should note that the bulk of 4633
Judge Wyatt's distribution order has not been appealed. We are asked today only to review the claim of two class members to additional damages, and a number of contentions concerning the distribution of attorneys' fees.

I.

Out of the more than 4400 class claimants, only two have objected to the amount of settlement funds allocated them. Before treating the merits of these objections, we cannot help but note that the virtual unanimity with which the retailer class accepted the settlement allocations stands as tribute to what we recently termed "Judge Wyatt's extraordinary feat of judicial administration" in handling these cases. *Eisen* v. *Carlisle & Jacquelin*, ——F. 2d——, slip op. 3217, 3228 (May 1, 1973). That feat is in no way marred by the two claims here, which, for the reasons outlined below, we find to be without merit.

The two objecting class members are Domaro, Inc., and Benalen Corporation. They both complain about Judge Wyatt's refusal to award them "special damages." Each claimed that it had refused to buy antibiotics from the defendants, ostensibly because of the antitrust violations, and thus went to Italy for "wonder drugs." However, domestic customers, who were fearful of infringing the patent arrangements of the defendants, allegedly would not buy from Domaro and Benalen. Hence the "special damages" claim for amounts over and above the figures Judge Wyatt allotted, the latter being arrived at by simply multiplying the total dollar amounts of antibiotics purchased from the defendants times a fixed percentage.

While it seems likely to us that the only manageable way of allocating the settlement funds was through such a

formula, ignoring the specialized claims of individual class members, we need not so decide in this instance. The record indicates that the original claims submitted by Domaro

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and Benalen, in August of 1969, inexplicably failed to mention the European purchases theory of "special damages." It was not until over two and one-half years later, at a hearing held to consider the Amended Second Stage Plan of Allocation, that appellants sought to press this claim upon the district court. Judge Wyatt told appellants at that time of the great difficulties caused by accepting late damage claims, and eventually limited these members, as all others, to damages measured by the formula outlined above.

We are convinced that the late nature of the claims alone here justifies affirmance. As Judge Wyatt noted, when there are over 4400 claims on file, those who develop late theories about "special damages" do so at their peril. Thus, even putting to one side the rather speculative nature of the claims at hand, we find no error in Judge Wyatt's handling of them.

II.

The remaining contentions center on Judge Wyatt's decisions with respect to the awarding of counsel fees. Few subjects associated with the class action device have generated as much critical commentary in recent years as the matter of attorneys' fees. *See e.g., State of Illinois* v. *Harper & Row Publishers, Inc.*, 55 F.R.D. 221 (N.D. Ill. 1972); 7A C. Wright & A. Miller, Federal Practice and Procedure § 1803 (1972 Supp.); Manual for Complex and Multidistrict Litigation § 1.47 (1973 rev.); Comment, *Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 Cal. L. Rev. 1656 (1972); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust*

Suits—The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9-10 (1971). As Judge Decker has wryly put it, the lucrative fees involved in recent class actions

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may evoke public acceptance of an Italian proverb, "A lawsuit is a fruit tree planted in a lawyer's garden." *State of Illinois* v. *Harper & Row, supra*, 55 F.R.D. at 224.

As the recently revised Manual for Complex and Multidistrict Litigation suggests, there are several competing considerations at work in the award of class action counsel fees. One accepting employment as counsel in a class action does not become a class representative through simple operation of the private enterprise system. Rather, both the class determination and designation of counsel as class representative come through judicial determinations, and the attorney so benefited serves in something of a position of public trust. Consequently, he shares with the court the burden of protecting the class action device against public apprehensions that it encourages strike suits and excessive attorneys' fees. *See* 7A C. Wright & A. Miller, *supra*, at § 1803.

On the other hand, few would dispute the basic proposition that one whose labors produce a favorable result deserves adequate recompense. Such a notion is particularly applicable in the area of the antitrust class action, which depends heavily on the notion of the private attorney general as the vindicator of the public policy. *See, e.g., Perma Life Mufflers, Inc.* v. *Int'l Parts Corp.*, 392 U.S. 134 (1968). In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation.

Balancing these competing interests is peculiarly a job for the district court, which is the forum most familiar

with the particular equities in an individual instance. Consequently, it by now a matter of faith that attor-
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neys' fees are a matter left to the reasonable discretion of the trial judge. *See* 7A C. Wright & A. Miller, *supra*, at § 1803 and cases cited therein. But that discretion is not absolute, and courts of appeal have not hesitated, in appropriate instances, either to modify fee awards, *see, e.g., United States* v. *American Society of Composers*, 466 F. 2d 917 (2d Cir. 1972); *Freeman* v. *Ryan*, 408 F. 2d 1204 (D.C. Cir. 1968); *Green* v. *Transitron Electronic Corp.*, 326 F. 2d 492 (1st Cir. 1964), or to remand a case for reconsideration and further findings to the district court, *see, e.g., Angoff* v. *Goldfine*, 270 F. 2d 185 (1st Cir. 1959).

The general factors to be considered in awarding counsel fees were extensively reviewed by Judge Wyatt in *City of Philadelphia* v. *Chas. Pfizer & Co.*, 345 F. Supp. 454, 482-83 (S.D.N.Y. 1972), a discussion that was incorporated by reference into the opinion below. The antitrust cases have identified as relevant such considerations as: (1) the standing of the counsel at the bar; (2) time and labor spent; (3) complexity of the litigation; (4) the amount recovered; (5) the responsibility undertaken; (6) the court's knowledge of the amount and quality of the work done; (7) what it would be reasonable for counsel to charge a victorious plaintiff; and (8) whether or not counsel had the benefit of a prior decree in a Government-brought case. *See Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 245 F. Supp, 258, 302 (M.D. Pa. 1965), *vacated on other grounds*, 377 F. 2d 776 (3rd Cir. 1967), *aff'd in part and rev'd in part on other grounds*, 392 U.S. 481 (1968); *Trans World Airlines* v. *Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970), *aff'd*, 449 F. 2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973). In addition,

as Judge Wyatt made note in the *City of Philadelphia* opinion, the Code of Professional Responsibility of the American Bar Association states a number of related

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considerations, including the contingent nature of the fee expectancy, which also may be taken into account. And, of course, the standards, outlined above, of revised § 1.47 of the Multidistrict Manual are especially relevant to the awarding of counsel fees in a case like this.

But, as a number of courts have recently recognized, factors such as those related above, while helpful, can serve only as guides, not as precise yardsticks. *See* Comment, *Attorneys' Fees in Individual and Class Action Antitrust Litigation, supra,* at 1667-68 & n. 66, and cases cited therein. In the end, no mathematical formula, or precise weighing of specific factors is necessary, nor even desirable. In fact, there is no requirement that each of the listed criteria be taken into account, only that the final award be reasonable under the circumstances of the case.

As one commentator has noted, "there are nearly as many notions of what is reasonable as there are judges." Clark, *The Treble Damage Bonanza*§ *New Doctrines of Damages in Private Antitrust Suits,* 52 Mich. L. Rev. 363, 412 (1954). It is an inevitable corollary of that observation that a reviewing court can only perform its functions, however limited, by looking at the facts of the case at hand to determine whether the district judge did in fact act reasonably. Consequently, it is to those facts which we now turn.

A.

After the basic settlement offer in this case was accepted in principle by nearly all of the plaintiffs to whom it was addressed, Judge Wyatt, on May 26, 1969, ordered that the actions commenced by wholesale and retail druggists be

consolidated as to the "consolidated wholesaler-retailer class action." There were thirteen such individual actions; the class was specified to be all purchasers of broad spectrum antibiotics who bought for resale at wholesale or
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retail. The May 26 order further provided that the class was to be represented by a "Committee of Counsel," comprised of all counsel of record in the thirteen actions.

It was this Committee which undertook the overwhelming bulk of the relevant legal labors in this case. The Committee not only took part in the extensive settlement negotiations and the bargaining that led to the escrow idea, but also participated fully in the judicial proceedings, both in the district court and on appeal, that resulted in the ultimate approval of the settlement. After the approval, it was the Committee which bore the brunt of administering the processing of the claims of class members, and developing a plan of allocation.

At the time of the fee petitions here, the Committee consisted of nine active law firms.[4] The Committee requested a total of $4 million in counsel fees, or about 32% of the total recovery. The nine Committee members then agreed among themselves as to an allocation of that sum, representing that their agreement was an evaluative consensus of the work done.

Judge Wyatt disposed of the issue of fee awards to the Committee in rather summary fashion in his otherwise

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4. Judge Wyatt denied the counsel fee applications of Dene L. Lusby and Donald B. Brown, both of whom had been members of the original Committee, holding that they did not contribute to any of the group's activities. Neither has appealed.

The claims of another set of counsel on the original Committee, the representatives of Cotler Drugs, Inc., are dealt with at some length in part II C, *infra*.

extensive opinion below. He briefly noted that he had numerous papers and supporting affidavits before him on the issue of counsel fees, and then stated that he had set out the appropriate factors with regard to such awards in his *City of Philadelphia* opinion, 345 F. Supp. at 482-3, and would not repeat them. The following constitutes the entire

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balance of the district judge's treatment of the Committee fee petitions:

> "There are a number of factors which suggest a generous allowance, the chief of which is the result accomplished (especially the increase by way of interest). There are a number of factors which suggest a modest allowance, for example, that the government and other plaintiffs pioneered the claims, that the considerable time spent in processing claims of class members did not require a high degree of professional skill, and that there was extensive duplication of effort (nine law firms on the Committee, two of which acted in the same action).
>
> The list below shows the amounts asked for counsel fees, the amounts allowed for counsel fees, and the amounts allowed for expenses of counsel (these are the same as the amounts asked):

Name	*Fees Asked*	*Fees Allowed*	*Expenses Allowed*
Levy and Erens 208 South La Salle Street Chicago, Illinois 60604	$ 965,000	$ 470,000	$ 13,144.84
Schwartz & Alschuler 880 Century Park East Los Angeles, California 90067	840,000	370,000	29,308.36
Jerome S. Wald 100 West Monroe Street Chicago, Illinois 60603	484,000	290,000	7,000.61

Name	*Fees Asked*	*Fees Allowed*	*Expenses Allowed*
James P. Chapman Peter A. Loutos James B. Sloan 39 South La Salle Street Chicago, Illinois 60603	452,000	240,000	12,579.03
Cochrane & Bresnahan, P.A. 830 Minnesota Building St. Paul, Minnesota 55101	328,000	140,000	7,119.86
Chestnut, Brooks & Burkard 854 Midland Bank Bldg. Minneapolis, Minnesota 55401	296,000	115,000	10,679.19
Peck, Shaffer & Williams 1604 First National Bank Bldg. Cincinnati, Ohio 45212	260,000	115,000	23,928.84
Leo Schwartz 20 Beacon Street Boston, Massachusetts 02108	300,000	145,000	11,417.38
Sager & Burns 19 West Flagler Street Miami, Florida 33130	200,000	75,000	8,020.92
TOTAL	$4,125,000	$1,960,000	$123,199.03"

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Several appellants have claimed that the $1,960,000 total award is excessive, and constitutes an abuse of the district court's discretion. We cannot agree. Whether the award is viewed in relation to either the total recovery of over $12.5 million or merely in relation to the interest added by the escrow arrangement,[5] the total falls well within the range of attorneys' fees awarded in previous antitrust actions. *See* the cases cited in Comment, *supra*, 60 Cal. L. Rev. at 1679-82; *Lindy Bros. Bldrs., Inc.* v. *American Radiator and Standard Sanitary Corp.*, 341 F. Supp. 1077,

5. We phrase the question alternatively because of Judge Wyatt's holding that the law firm of Dickstein, Shapiro & Galligan was chiefly responsible for the creation of the initial $3 million fund. See part II D, *infra*.

1089-92 (E.D. Pa. 1972); *Hanover Shoe, supra,* 245 F. Supp. at 302-4 & n. 18; *see also* Hornstein, *Legal Therapeutics: The Salvage Factor in Counsel Fee Awards,* 69 Harvard L. Rev. 658 (1956). In addition to the favorable results achieved here, we are confident that Judge Wyatt was familiar with both the quality and quantity of work done by the Committee, and with the abilities of the counsel. Under all these circumstances, we do not view the total award as abuse of discretion.

Nevertheless, we are troubled by a related problem — the division of the total award among Committee members.

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We have been unable to discover, either from Judge Wyatt's opinion or from the record, any rationale to explain the precise distribution adopted. The final awards bear no discernible relationship to those requested, nor does there appear to be any simple correlation, mathematical or otherwise, applicable to the amounts granted the various Committee counsel.

On the rather vague state of the record, we find ourselves unable to deal with the contentions of several of the appellants that the Committee fee distribution is arbitrary and unfairly rewards certain firms. Indeed, we find striking the contrast between the sparse discussion below on this point and Judge Wyatt's comprehensive balancing of various relevant factors in arriving at fee awards in the *City of Philadelphia* case.

We do not imply that Judge Wyatt arrived at the individual breakdown in an erroneous manner. Indeed, the absence of any simple mathematical correlation between the various sums requested and those awarded suggest precisely the contrary — that each award was determined through careful consideration of the individual merits of each claim. Nor do we suggest that the district court —

which is quite familiar with the history of this case and had before it ample supporting papers — must necessarily hold an evidentiary hearing in this case.[6] *See Lindy Bros. Bldrs., Inc., supra,* 341 F. Supp. at 1083. All that we require is some explanation for the ultimate breakdown of the Committee award.

To be sure, many appropriate reasons governing the various distributions come to mind — disparities in hours worked, comparative standing at the bar of lawyers involved, differences in results achieved or types of work

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done, to name but a few. We cannot accept the suggestion of some appellants that a single precise formulation must be developed and applied unswervingly. But until the district court articulates some basis for the distribution of the Committee award, we are left to speculate as to its reasoning. Such speculation is inconsistent with even our limited review role here, so we remand the issue of the Committee fee award to the district court for further consideration and findings consistent with what we have said above.

B.

The district court's refusal to award attorney's fees to Harry Rubenstein presents far fewer difficulties. We conclude that Judge Wyatt plainly did not err here, and affirm.

Rubenstein represented a single class claimant, one Louis Patlogan, whose final portion of the settlement approximates $200. Patlogan never filed an individual action before the class consolidation; Rubenstein was consequently not a Committee member. Thus, while Rubenstein continually appeared in the proceedings below, *see* Fed. R. Civ. P. 23 (e) (2) (C), he rather clearly did so on behalf of his

6. Of course, we do not wish to preclude such a hearing, should the district court deem it advisable.

client, not the class. By his own account, Rubenstein had nothing to do with either the basic settlement or escrow fund negotiations.

Nonetheless, Rubenstein seeks over $75,000 in counsel fees and costs. He makes two arguments. The first involves the fact that he and others initiated the appeal from Judge Wyatt's approval of the settlement offer, which, by preventing the settlement from becoming final, added about $650,000 in escrow interest to the wholesaler-retailer share of the final total. Rubenstein claims a substantial award for conferring this benefit upon the class.

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We do not think that Judge Wyatt abused his discretion in rejecting this argument. True, as we noted in our previous opinion, 440 F. 2d at 1091-92, the appeal did add funds to the class share. And, despite some suggestions to the contrary, we were unable to find that the appeal was motivated by bad faith. *Id.* at 1092. But it does not necessarily follow that those who took the appeal must inexorably be the beneficiaries of consequent attorneys' fees.

As the district judge noted, the CCS plaintiffs, alarmed by the delay inherent in the appeals process, offered to turn over the $650,000 in interest to the wholesaler-retailer class if the proceeding were withdrawn. Rubenstein and the others rejected that offer and continued to prosecute the appeal, a course which, both in Judge Wyatt's view and ours, was quite probably not in the best interests of the class. On April 16, 1970, this court had reversed the criminal convictions that had been suffered by the defendants here.[7] If the appeal, which was taken after that date, had ultimately been successful and had overturned the settlement, the defendants, without the impetus of the criminal convictions, might well have walked away from the whole

7. See the chronology in note 1, *supra*.

deal. Since the appeal at least exposed the class to that danger, Judge Wyatt did not abuse his discretion in refusing to award Rubenstein for it.

Rubenstein's second argument is that he deserves counsel fees for proving, in the unrelated *Ampicillin* cases, *see In re Ampicillin Antitrust Litigation*, 315 F. Supp. 317 (Jud. Panel on Mult. Lit. 1970); 55 F.R.D. 269 (D.D.C. 1972), that retail druggists do not uniformly take a 66⅔% mark-up on antibiotics. Even taking the rather large step of assuming the factual contention to be true, we are unable to perceive how this revelation is of any benefit to the class

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in this case.[8] The class fund here is not a pot out of which all those who generally further the cause of druggists in our society are to be rewarded. In the absence of even the hint of a showing of some benefit to the class in this case, Rubenstein has no real claim to attorneys' fees.[9]

C.

Edward A. Berman, Lewis W. Schlifkin, Lawrence Walner, Bernard B. Brody, Edward R. Johnston, and Jenner & Block, all of Chicago, who acted as counsel to Cotler Drugs, Inc., a plaintiff in one of the thirteen consolidated actions, have attacked as inadequate their attorneys' fee award of $75,000. Evaluation of the claims of these appellants (hereinafter Cotler counsel) requires a brief recapping of some of the history of this suit.

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8. Indeed, both the district court, 314 F. Supp. at 745, and this court, 440 F. 2d at 1088, seemed to assume the correctness of the 66-2/3% figure in approving the compromise of the retailer class' claims.

9. We regard as frivolous Rubenstein's various claims that, because two members of this panel sat on the *State of West Virginia* appeal, a new panel should be convened to hear this case. While any legally sufficient excuse for avoiding the rather complicated issues here might be welcomed, Rubenstein has provided us with none.

Cotler counsel, as representatives of one of the original thirteen plaintiffs, were designated members of the Committee of Counsel. Cotler counsel apparently had a number of disagreements with other members of the Committee, stemming not only from their original opposition to the settlement proposal, but also from their motion to have Cotler Drugs designated as the sole class representative and their continued insistence that the retailer class receive the entire $40 million allocated to non-CCS plaintiffs. These disagreements eventually led, on March 2, 1970, to Cotler counsel being "relieved temporarily of their duties as members of the Committee" by court order. It seems uncontested that they took no part in any of the Committee work

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after that date, although, as class representatives, they did appear frequently and argued their views to the district court. Cotler counsel were, along with Rubenstein, the prime architects of the appeal of Judge Wyatt's approval of the settlement proposal.

Cotler counsel originally sought attorneys' fees of $512,000. It seems clear to us that the figure is grossly excessive. First, the total was in part based on a claim for $162,500 (25% of $650,000) for the taking of the appeal from the settlement approval. For the reasons we outlined in rejecting Rubenstein's identical claim, we hold that Judge Wyatt did not err in refusing to accept this argument. Moreover, the balance of the fee request, $350,000, was arrived at not only by an overestimation of the total Committee award and some dubious arithmetic, but also by assuming that Cotler counsel, despite the March 2 order, deserved a full proportionate share of whatever the Committee received.[10]

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10 Cotler counsel arrived at the $350,000 figure by estimating a Committee fee award of $2.75 million, and then dividing that figure by nine. Of course, the eventual total award of counsel

As Judge Wyatt correctly noted, there are ample reasons in the record for denying Cotler counsel treatment equal to the other active Committee members. For one thing, Cotler counsel took no part in the Committee work after March 2, including the development of the plans of allocation and the processing of claims. For another, Judge Wyatt noted below that virtually all the arguments offered by counsel on behalf of the class were rejected. True, the presentation of dissident views should not in itself lead to the rejection of fee requests, but we find it difficult to view an award of $75,000 as stifling dissent. *Compare Ace Heating & Plumbing Co.* v. *Crane*, 453 F. 2d 30 (3rd Cir. 1971),

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where a district court order that had denied any fees to a dissident counsel was modified to allow a $3000 award, one-tenth of that requested.

In short, we are unable to view the $75,000 award as either shocking or arbitrary under the circumstances. Indeed, if the Cotler appeal were the only one before us, we might well affirm. But, in view of our decision to remand the Committee fee awards for further findings, we have, in an excess of caution, decided upon a remand here also. To the extent, if any, that further findings on the Committee division issue lead to reconsideration of the amount of those awards, we think it fair that the district judge have an opportunity to view the Cotler situation in that new light. Moreover, we are slightly troubled by Cotler counsel's allegations that the district judge erred in holding that they took no part in the negotiations leading to the creation of the escrow fund. While it is true that certain portions of

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fees to the Committee were less substantial. Moreover, it would seem that if Cotler counsel were to be included, the relevant number of law firms on the Committee to be given attorneys' fees would be ten, not nine.

Cotler counsel's fee petition indicate this to be true,[11] it is also true that appellants were full members of the Committee during this time period, and at least some Committee members have viewed the escrow idea as resulting from the efforts of the "whole Committee."[12] There may well be no real factual conflict here, but in view of the necessity of a remand on the Committee issue, which may well lead to a more detailed look at the contributions of the individual members to the end result, we think it appropriate to remand the Cotler award also.

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D.

All appellants have attacked Judge Wyatt's award of $350,000 in counsel fees to the law firm of Dickstein, Shapiro & Galligan (hereinafter Shapiro). For the reasons set out below, we find that the district judge did not abuse his discretion, and affirm the award.

The unusual aspect of the Shapiro situation, as Judge Wyatt recognized below, is that the firm did not act as counsel to any of the wholesaler-retailer plaintiffs. Rather, Shapiro was counsel to about twenty CCS plaintiffs at the time the February 6, 1969, "global settlement" offer was made; the firm later acted as counsel to a number of other CCS entities.

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11. The Cotler fee petition notes that the escrow idea was "unveiled" at a meeting of the Committee on October 2-3, 1969. Yet the fee application of Dickstein, Shapiro & Galligan reveals that David I. Shapiro, at least, had been informed of the escrow proposal as early as September 26, 1969. This would at least imply non-participation by Cotler counsel in the formulation of the escrow plan.

12. Compare the treatment of the Committee petition, where Judge Wyatt did not undertake to outline the contributions, or lack thereof, of any individual member to the escrow negotiations.

The factual background of the Shapiro firm's participation in the settlement process is set out at length both in the opinion below and Judge Wyatt's prior *City of Philadelphia* opinion. It was this firm, acting chiefly through David I. Shapiro, which was the chief negotiator of the February 6, 1969, global settlement offer. That offer did not allocate specific sums to the various classes of claimants; it had in mind only that the claims of the consumer class, the CCS entities, and the wholesaler-retailer class would be encompassed in the settlement. No counsel for the wholesaler-retailer claimants took part in the negotiations leading up to the global settlement offer.

After the offer was made, Shapiro worked to gain acceptance of it by counsel for the various wholesaler-retailer plaintiffs. He proposed that the retailer class be allocated $3 million of the $100 million offer; when asked if he would seek a fee from this allocation Shapiro stated that he would not, if the proposal were then accepted. Counsel for the wholesaler-retailer plaintiffs eventually accepted the global offer, but did not accept the $3 million proposal.

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The May 26, 1969, consolidation order followed. In the subsequent negotiations over the precise allocation of the settlement fund, a number of CCS entities took the position that the retailer class should receive nothing from the settlement fund, since they had "passed on" any increased prices to the eventual consumers. The Committee of Counsel, on the other hand, filed an allocation plan with the district court demanding $40 million. Shapiro, who filed a $3 million proposal, informed the Committee that he was opposed to their plan, and that if defendants eventually adopted the $3 million suggestion, he would feel justified in seeking a counsel fee for creating that fund. Several

other plans filed by CCS entities, as might be expected, allocated nothing to the wholesaler-retailer class.

Shapiro then took part in negotiations with both the defendants and with the Committee aimed at satisfying the retailer class. It was out of these negotiations that the basic compromise arose—an allocation of $3 million to the class, plus the interest from the escrow account.

Shapiro did not claim credit for the latter idea, preferring to credit the efforts of the Committee. He did, however, argue to the district judge that it was his efforts that were responsible to the basic $3 million allocation, and sought 25% of that sum, or $750,000, in attorneys' fees.

Judge Wyatt found that "[i]t is certain that the efforts of Shapiro were largely responsible for the creation of the $3,000,00 fund allocated to the retailer class." He concluded that it was only fair that those who benefited from the firm's efforts ought to contribute to the allowance to counsel, and thus awarded the Shapiro firm $350,000 out of the class fund.

Appellants contend that since Shapiro was the lead counsel for the CCS entities, and thus an "adversary" of the retailer class, that no such counsel fees award can

be made. While it is true that Shapiro did not represent any wholesaler-retailer class members, the court's power to make an attorneys' fee award under these circumstances seems clear from *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), and its progeny. In *Ticonic Bank,* Mr. Justice Frankfurter recognized the historic powers of the equity court to allow counsel fees and costs to a party whose efforts result in the creation of a fund that benefits others. That equity power was not limited merely because the benefited party did not sue on behalf of the eventual fund beneficiaries. As the Court put it, 307 U.S. at 167:

> "Whether one professes to sue representatively or formally makes a fund available for others may, of

> course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation — the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree — hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation."

Since Judge Wyatt gave Shapiro credit for creating the fund that benefits the wholesaler-retailer class here, the fact that the firm did not sue on behalf of that class presents no bar to an allowance out of the fund. *See also United States* v. *American Society of Composers,* 466 F. 2d 917 (2d Cir. 1972). Nor does the characterization of the CCS entities as "adversaries" of the retailer class compel a different result. *O'Hara* v. *Oakland County,* 136 F. 2d 152 (6th Cir. 1943). The relevant factor is the creation of the fund, not what Justice Frankfurter termed "the formalities of the litigation."

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Nor do we find compelling appellants' unsubstantiated contentions that Shapiro did not in fact play a large role in creating the fund. As noted above, both the opinion below and the *City of Philadelphia* opinion describe Shapiro's contributions in great detail, and we could hardly undertake to dispute Judge Wyatt's familiarity with the history of these actions. Given the rather ample record below, the voluminous supporting papers, and Judge Wyatt's personal involvement in much of this case, the holding of an evidentiary hearing was not necessary. *See Lindy Bros., supra.*

In short, we find no error in the Shapiro award, and affirm this part of the judgment below.[13]

E.

After determining the fee awards to the Committee, Judge Wyatt dealt with several claimed expenses of that group which were asked to be charged against the settlement fund. These items, listed under headings 14a through 14d in the opinion below, ranged from a bill from a law firm for tax advice to payments for computer services. As Judge Wyatt recognized, each item was inadequately explained by the Committee. Because the district judge thought it critical to avoid delay in distribution of the class fund, he felt it necessary to accept these items "on faith."

Since a remand is necessary for other reasons, we think it proper that these expense items be explained to the district court by the Committee. While we have no reason to

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believe that any of these are anything but properly claimed, they do total about $62,000, a not insignificant sum even in this litigation. On remand, the district court should satisfy itself as to their necessity.

III.

In summary then, we affirm (1) the district court's denial of "special damages" to Domaro and Benalen; (2) the denial of counsel fees to Harry Rubenstein; and (3) the award of such fees to the Shapiro firm. We remand for further proceedings the matters of (1) the counsel fees of the Committee of Counsel; (2) the objections of Cotler counsel to their fee award; and (3) the various expense items taken "on faith."

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13. We do not read any of the appellants' briefs as challenging the amount of the award, probably because the thrust of their arguments goes to the power of the court to give attorneys' fees to the Shapiro firm at all. Given Judge Wyatt's finding that Shapiro was chiefly responsible for creation of a $3 million fund, we are unable to view an award of $350,000, or slightly over 10% of the fund, as an abuse of discretion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-562

LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY, and HARRY RUBENSTEIN, his attorney, *Petitioners,*

v.

DICKSTEIN, SHAPIRO & GALLIGAN, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR COMMITTEE OF COUNSEL FOR THE CONSOLIDATED WHOLESALER-RETAILER CLASS ACTION AND FOR DICKSTEIN, SHAPIRO & GALLIGAN

Members of the Committee:

SCHWARTZ & ALSCHULER,
Co-Chairman
JAMES P. CHAPMAN
CHESTNUT, BROOKS & BURKHARD
COCHRANE & BRESNAHAN
PETER A. LOUTOS
PECK, SHAFFER & WILLIAMS
SAGER & BURNS
LEO SCHWARTZ
JAMES B. SLOAN
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-562

LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY, and HARRY RUBENSTEIN, his attorney, *Petitioners,*

v.

DICKSTEIN, SHAPIRO & GALLIGAN, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION FOR COMMITTEE OF COUNSEL FOR THE CONSOLIDATED WHOLESALER-RETAILER CLASS ACTION AND FOR DICKSTEIN, SHAPIRO & GALLIGAN

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (Pet. App. A1-A56) is not yet reported; the pertinent portions of this lengthy opinion appear at Pet. App. A1-A19 (stating the general background and describing the procedures followed in the

district court) and A49-A55 (dealing specifically with the fee issues raised by the petition).[1] The district court's opinion incorporates by reference that court's earlier opinion on another aspect of counsel fees in the same litigation reported *sub. nom City of Philadelphia* v. *Chas. Pfizer & Co., Inc.*, at 345 F. Supp. 454; for the Court's convenience, the pertinent portions of that earlier opinion are set forth as an Appendix hereto at pp. 1a-16a, *infra*. The opinion of the Court of Appeals for the Second Circuit unanimously affirming the portions of the district court's decision challenged by the petition (Pet. App. A57-A80) is reported at 481 F.2d 1045. Earlier opinions on other aspects of this *Antibiotics* antitrust litigation are cited and explained in the court of appeals opinion (see Pet. App. A58-A59 and note 1).

JURISDICTION

The district court's jurisdiction was founded upon 28 U.S.C. § 1337, 15 U.S.C. § 15 and F.R. Civ. P. 23. The judgment of the court of appeals was entered on July 2, 1973 and the petition for a writ of certiorari was filed on September 27, 1973. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).[2]

QUESTIONS PRESENTED

The petition challenges two aspects of the district court's determination of the attorneys' fees to be paid

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[1] The Appendix to the petition omits approximately two pages from the end of the district court opinion. These pages deal with administrative details that are not pertinent here.

[2] The jurisdiction of the court of appeals was founded upon 28 U.S.C. § 1291, not § 1292(b) as stated in the petition.

out of a class action settlement fund. The questions presented are:

1. Did both courts below err in finding that the attorney for a claimant class member conferred no benefit on the class and therefore was not entitled to a fee from the class fund?

2. Did both courts below err in finding that counsel for certain other classes in the litigation was largely responsible for creating the basic portion of this settlement fund and therefore was entitled to a partial fee from the fund?

STATUTES INVOLVED

While this litigation was brought under Section 4 of the Clayton Act and F.R. Civ. P. 23 (set forth in whole and in part, respectively, at Pet. App. 4), the counsel fee determinations challenged in the petition were pursuant to the district court's inherent powers and not governed by any statutory provisions.

STATEMENT

This petition arises from the dissatisfaction of one of the more than 4400 claimant members of the wholesale-retail druggist class in this antitrust litigation—and his attorney—with the district court's allocation of attorneys' fees out of the settlement fund obtained for that class. That fund (totaling about $13 million) was created as a part of an overall settlement also including, as the principal beneficiaries, classes of state and local governmental entities ("CCS") and individual purchasers of the antibiotic drugs in suit. The claimant's attorney is dissatisfied because the district court did not require the class to pay him a fee, and the

claimant is dissatisfied because the district court determined that the class should compensate the lead CCS-consumer attorneys (respondent Dickstein, Shapiro & Galligan) for their role in the creation of the druggist settlement fund. The court of appeals, with an extensive opinion, affirmed the district court on these and other points not raised in this Court (Pet. App. A57-A80).

While there were numerous parties in the earlier phases of the district court proceedings, only five parties (or groupings of parties) appeared in the court of appeals. Of the three appellant groups, two have not sought further review. This brief in opposition is submitted on behalf of both appellees below—(1) The Committee of Counsel for the Consolidated Wholesaler-Retailer Class Action, which was constituted by the district court in the first stage of the proceedings to include all counsel of record for druggist plaintiffs;[3] and (2) Dickstein, Shapiro & Galligan.[4]

While the Committee of Counsel opposed the Dickstein, Shapiro & Galligan fee award in the district court, it did not appeal from the district court's decision, believing that such an appeal would not be in the best interests of the wholesaler-retailer class. Accord-

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[3] Petitioner Rubenstein is not a member of the Committee because, as explained *infra*, he filed no action and did not appear, as counsel for a claimant class member, until some ten months after the wholesaler-retailer cases were structured as a single class action for settlement purposes and the Committee constituted on May 26, 1969 (see J.A. 11).

[4] Although the name of this law firm has been changed, it has continued to appear under its original name to reflect the fact that the new members of the successor firm have no interest in the fees to be awarded in this case.

ingly, respondents are in agreement that the petition raises no issue remotely warranting review by this Court.

This litigation (commonly referred to as the settled *Antibiotics* antitrust litigation) was previously before this Court in the 1971 Term on the petition of the same claimant and a few others for review of the district court's approval of the settlement. *Cotler Drugs, Inc. et al.* v. *Chas. Pfizer & Co., Inc., et al.*, No. 70-338, *certiorari denied*, 404 U.S. 871. At that time, the settlement and the allocation of the funds among the plaintiff classes became final. The ensuing proceedings resulting in this petition have dealt with the "second stage" distribution of the settlement funds among the individual members of the wholesaler-retailer class and the determination of attorneys' fees and other expenses chargeable to that class.[5] The proceedings as a whole are succinctly described in the court of appeals opinion (A58-A62); we confine ourselves here to a brief statement of the facts necessary for an understanding of the two subsidiary questions relating to fees that are raised by the petition.

1. Petitioner Rubenstein's Claim for a Fee.

Petitioner Rubenstein first appeared in this litigation in March 1970 as counsel for petitioner Patlogan, who had filed a claim as a member of the wholesaler-retailer class (J.A. 2).[6] By that time, the basic settlement had long since been agreed upon. As the court of appeals observed, "Patlogan never filed an individual action

---

[5] Neither the present petition nor the opinions below relate to the CCS-consumer cases, the "second stage" aspects of which are proceeding separately.

[6] The reference is to the Joint Appendix in the court of appeals.

before the class consolidation" and "[b]y his own account, Rubenstein had nothing to do with either the basic settlement or escrow fund negotiations," which established the wholesaler-retailer settlement fund against which Patlogan and some 4,400 other druggists made their claims. Thus, the court of appeals agreed with the district court that Rubenstein's efforts were "on behalf of his client, not the class," and his compensation should come only from his client and not from the settlement fund to which he had added nothing. Pet. App. A71-A72; see also Pet. App. A53-A55.

The one alleged benefit that the petition claims Rubenstein conferred upon the class as a whole was discussed fully by the court of appeals, as follows:

> "[This argument] involves the fact that [Rubenstein] and others initiated the appeal from Judge Wyatt's approval of the settlement offer, which, by preventing the settlement from becoming final, added about $650,000 in escrow interest to the wholesaler-retailer share of the final total.[7] Rubenstein claims a substantial award for conferring this benefit upon the class.
>
> "We do not think that Judge Wyatt abused his discretion in rejecting this argument. True, as we noted in our previous opinion, 440 F.2d at 1091-92, the appeal did add funds to the class share. And,

[7] This was the appeal that brought the litigation to this Court earlier, as noted at p. 5, *supra*. The final settlement agreement provided that the wholesaler-retailer fund would consist of two elements: (1) $3 million out of defendants' overall $100 million settlement offer and (2) the interest accrued on the entire $100 million over a period of 13 or 14 months, depending on the date when the settlement was finally approved. The appeal delayed approval and thereby added the 14th month's interest, which amounted to about $650,000.

despite some suggestions to the contrary, we were unable to find that the appeal was motivated by bad faith. *Id.* at 1092. But it does not necessarily follow that those who took the appeal must inexorably be the beneficiaries of consequent attorneys' fees.

"As the district judge noted, the CCS plaintiffs, alarmed by the delay inherent in the appeals process, offered to turn over the $650,000 in interest to the wholesaler-retailer class if the proceeding were withdrawn. Rubenstein and the others rejected that offer and continued to prosecute the appeal, a course which, both in Judge Wyatt's view and ours, was quite probably not in the best interests of the class. On April 16, 1970, this court had reversed the criminal convictions that had been suffered by the defendants here. If the appeal, which was taken after that date, had ultimately been successful and had overturned the settlement, the defendants, without the impetus of the criminal convictions, might well have walked away from the whole deal. Since the appeal at least exposed the class to that danger, Judge Wyatt did not abuse his discretion in refusing to award Rubenstein for it. * * * In the absence of even the hint of a showing of some benefit to the class in this case, Rubenstein has no real claim to attorneys' fees." [Pet. App. A72-A73; footnotes omitted.]

2. The Fee Award to Dickstein, Shapiro & Galligan

While the Dickstein, Shapiro & Galligan law firm (referred to as "Shapiro" by the courts below) was retained in the litigation by some twenty CCS plaintiff-class representatives and did not appear formally in the wholesaler-retailer cases, the district court found Shapiro's dominant efforts in prosecuting and settling the entire complex of litigation "largely responsible for the creation of the [basic] $3,000,000 fund allocated

to the retailer class." It concluded that "It is fair, just and reasonable that Shapiro receive an allowance from that fund; those who accept the benefit, namely, the retailer class, ought to contribute to allowances to counsel who made possible the benefit." Pet. App. A52-A53.

The court of appeals found ample support for these findings and agreed that such a fee award was proper as a matter of law under the circumstances, holding that

> "While it is true that Shapiro did not represent any wholesaler-retailer class members, the court's power to make an attorneys' fee award under these circumstances seems clear from *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), and its progeny. In *Ticonic Bank*, Mr. Justice Frankfurter recognized the historic powers of the equity court to allow counsel fees and costs to a party whose efforts result in the creation of a fund that benefits others. That equity power was not limited merely because the benefited party did not sue on behalf of the eventual fund beneficiaries. * * *
>
> "Since Judge Wyatt gave Shapiro credit for creating the fund that benefits the wholesaler-retailer class here, the fact that the firm did not sue on behalf of that class presents no bar to an allowance out of the fund. See also *United States* v. *American Society of Composers*, 466 F.2d 917 (2d Cir. 1972). Nor does the characterization of the CCS entities as 'adversaries' of the retailer class compel a different result. *O'Hara* v. *Oakland County*, 136 F.2d 152 (6th Cir. 1943). The relevant factor is the creation of the fund, not what Justice Frankfurter termed 'the formalities of the litigation.'" [Pet. App. A78-A79.]

In affirming these two elements of the district court's fee determination, the court of appeals placed great

reliance on District Judge Wyatt's familiarity with the contributions of counsel derived from his long exposure to the litigation (see Pet. App. A70, A79). Nonetheless, while agreeing with his statement of the applicable legal principles and endorsing the principle that attorneys' fees are peculiarly a matter for the trial judge's reasonable discretion (Pet. App. A65), the court of appeals did remand certain aspects of the fee determination (not involved in the present petition) for reconsideration. That same thorough review found no suspicion of error or abuse of discretion with respect to the matters challenged here by a single claimant and his attorney.

ARGUMENT

The petition presents no question of law. It is common ground that the principle of *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, gave the district court discretionary power to compensate either petitioner Rubenstein or respondent Dickstein, Shapiro & Galligan or both to the extent it reasonably found such compensation warranted by the facts and equitable considerations. The only issue raised by the petition is whether the district court misapprehended the facts or abused its discretion in declining a fee to one and awarding a fee to the other. The court of appeals reviewed the district court's determinations with meticulous care and unanimously found no suggestion of error or abuse with respect to the matters challenged by the petition. Especially in view of the latitude that trial courts have in such fee matters (*Trustees* v. *Greenough*, 105 U.S. 527, 539; *Stuart* v. *Boulware*, 133 U.S. 78, 82; *W. W. Montague & Co.* v. *Lowry*, 193 U.S. 38, 48), there is not the slightest reason why this

Court should review the concurrent findings of the two courts below. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

There is no basis for the contention that the denial of Rubenstein's request "stifled dissent." The Rubenstein denial was not based upon any categorical disqualification, and in fact the court awarded a fee to another dissident (see Pet. App. A46-A49). The concurrent findings of the two courts below were based simply upon a determination that Rubenstein—who appeared under Rule 23(c)(2)(C) on behalf of a single claimant member of a class that was already well represented—had not made "even the hint of a showing of some benefit to the class" (Pet. App. A73). There is therefore no conflict with *Ace Heating & Plumbing Co., Inc.* v. *Crane Co.*, 453 F.2d 30 (3 Cir. 1971), which held only that dissent did not "result in forfeiture of the right to be reimbursed for compensable legal services" (453 F.2d at 35). It is a far cry from that holding to the untenable proposition that all dissenters *must* be rewarded without regard to benefit.

Petitioners' contention that Dickstein, Shapiro & Galligan have been awarded "double fees" mischaracterizes the district court's determination of this matter and its relationship to the fees to be awarded on account of other aspects of the litigation. *Powell* v. *Pennsylvania R. Co.*, 267 F.2d 241 (3 Cir. 1959), with which petitioners suggest some inconsistency, was concerned with an attorney's collecting twice from the *same client* for the same services or benefits—as a class member and under a private fee contract (267 F.2d at 247). Here, in contrast, there was no question either

of double payment by the wholesaler-retailer class or of double compensation to any attorney. The court of appeals specifically held that the aggregate fees awarded counsel for the class were reasonable in relation to the escrow-interest portion of the fund by itself (Pet. App. A69) and that the Shapiro award was reasonable in relation to the basic $3,000,000 fund (Pet. App. A80, n. 13); petitioners do not challenge those holdings. Nor is there any potential element of double compensation in the finding that the wholesaler-retailer class fund—as well as the CCS and consumer class funds—should contribute *a share* of the total fair compensation due to Shapiro.[8] While the respondent Committee disagreed with the district court's factual finding that Shapiro was responsible for creating the portion of the wholesaler-retailer fund that was charged with a share of his fee, the Committee concluded that appellate review of that discretionary determination was inappropriate.

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[8] Petitioners' faint reference to "false affidavits" (Pet. 19) echoes charges that they argued extensively below but which the court of appeals did not deem worthy of mention in its opinion. The district court had earlier rejected these charges as wholly "frivolous" and "irresponsible" (Jan. 31, 1972 tr. 39-42). See also Brief in Opposition for City, County and State Respondents in No. 70-338 at pp. 10-11.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Excerpts from Opinion in City of Philadelphia v. Chas. Pfizer & Co., Inc. (345 F.Supp. 454, March 31, 1972) Stating Fee Criteria and Describing Role of Dickstein, Shapiro & Galligan in This Litigation

WYATT, District Judge.

This is a petition by Harold E. Kohn (and by other counsel associated with him), attorney for plaintiffs in these class actions, for an order approving a fee of $2,000,000, to be paid by defendants to Kohn and his associates. The petition is undated but was submitted in open Court on January 24, 1972 in the presence of counsel for defendants and was at that time ordered by me to be filed and docketed. Mr. Kohn and counsel for defendants were heard on that occasion. Decision on the petition was reserved.

Mr. Kohn is an experienced lawyer in antitrust matters; his office is in Philadelphia. He personally took the active part amongst the petitioners; he and his associate, Miss Korman (one of the petitioners) are known to me from their appearances before me; the other petitioners are not known to me and I am not personally aware of any relevant activity by them.

A "Supplement to Petition", also undated, was thereafter mailed to the Clerk and was received for filing on February 14, 1972.

The caption of the petition shows three civil actions in which Kohn represents the plaintiffs. Apparently, notice of the petition was given to defendants only. When the petition was heard, only defendants were represented and had been notified.

I. Commencement of the Actions Now Being Settled

A. Commencement of Actions Before Verdict in the Criminal Case

The extensive background of these three class actions and many similar actions need not be here reviewed in detail. It is described in my opinions in State of West Virginia v. Chas. Pfizer & Co., D.C., 314 F.Supp. 710, affirmed 2 Cir., 440 F.2d 1079, and in Hartford Hospital v. Chas. Pfizer & Co., D.C., 52 F.R.D. 131 (see on appeal from denial of motion to intervene, American Hospital Assn. v. Chas. Pfizer & Co., 2 Cir. 448 F.2d 790).

For present purposes, the history may begin with the filing on August 17, 1961 of an indictment in this District naming Pfizer, Cyanamid and Bristol as defendants (61 Cr. 772) along with some individuals, whose motions to dismiss were subsequently granted (United States v. Chas. Pfizer & Co., D.C., 245 F.Supp. 801). The indictment charged violation of the antitrust laws in respect of broad spectrum antibiotic drugs. It was some time before any civil claim was asserted against defendants. In time, however, many similar civil actions were commenced. All of these actions not commenced in this District were transferred here by the Judicial Panel on Multidistrict Litigation.

1.

In 1963, Premo Pharmaceutical Corporation (Premo), a drug business operating from New Jersey, began to import tetracycline from Italy. Pfizer on September 20, 1963 commenced an action for patent infringement against Premo in the United States District Court for the District of New Jersey (C.A. 766-63). Premo filed in that action a counterclaim asserting violation by Pfizer of the antitrust laws. Premo then retained a lawyer, Dennis, to assist patent counsel in prosecuting the counterclaim.

2.

In the following year, 1964, Premo was low bidder for sales of tetracycline to the City of New York but, since Pfizer had threatened the City with a patent infringement suit if it bought from Premo, the City in buying from Premo required Premo to post an indemnity bond. By this time, Dennis had become a partner in the law firm of Dickstein, Shapiro & Galligan. Premo consulted this firm in connection with the furnishing of the indemnity bond to the City.

In June 1964, Pfizer commenced an action in this Court against the City of New York and against the surety on Premo's indemnity bond; the complaint alleged infringement of the Conover patent. This is an action still pending (64 Civ. 1742).

The defendant City of New York retained as its counsel Dickstein, Shapiro & Galligan; on July 1, 1964, these lawyers filed an answer. This answer contained a counterclaim asserting a cause of action for treble damages against Pfizer, Cyanamid, Bristol, Squibb and Upjohn for violation of the antitrust laws. The counterclaim was based on the charges in the indictment and in substantial part is word for word copied from the indictment. The counterclaim did not set out any claim for a class. Mr. Shapiro and Mr. Galligan have not only been active in the City of New York action but, as will appear, have been active in many other actions involving antibiotic antitrust claims.

3.

It was some time before any claim similar to that of the City of New York was asserted against defendants. (On July 13, 1964, Premo commenced an action in this Court (64 Civ. 2163) against the defendants other than Pfizer.)

In November 1966, the Shapiro firm negotiated a settlement of the Premo litigation. A chief feature of the

settlement was a license by Pfizer to Premo and two other companies to make, sell, etc. tetracycline. This license, according to Shapiro and as agreed implicitly by all other counsel for plaintiffs, marked the end of the claimed antitrust law violations.

4.

On August 4, 1967, the State of Texas commenced an action in the Northern District of Texas (CA 3—2165; after transfer here, 68 Civ. 4375). The Shapiro firm was of counsel. This was the first action commenced by a plaintiff to assert treble damage antitrust claims against defendants. It was a class action for the State of Texas and all cities, counties, and other political subdivisions in Texas which had bought antibiotics during the relevant period. (City, county and state entities are, in the context of these actions, often called "CCS" entities and the actions are often called "CCS" actions.)

5.

In August 1967, Pfizer commenced a patent infringement action in the Central District of California (67-793-R; after transfer here, 68 Civ. 4541) against Benalen Corporation, a wholesale drug house. On August 24, 1967, Benalen filed an answer with a counterclaim for violation of the antitrust laws. The counterclaim as then filed did not state a claim for a class. On September 18, 1967, Benalen filed an amended counterclaim which did assert the antitrust claim for a class of all drug wholesalers in California who had bought and resold antibiotics at wholesale in the relevant period. This was the first civil antitrust claim asserted against defendants by a wholesale druggist. Counsel for Benalen have been Schwartz & Alschuler, for whom Benjamin F. Schwartz and Herbert A. Karzen have been principally engaged.

6.

On September 18, 1967, Domaro, a California retail druggist, commenced an action against defendants in the Central District of California (67-1366-R; after transfer here, 68 Civ. 4542). The Schwartz firm represented Domaro. The claim was stated for a class of all retail druggists in California who bought and resold antibiotics at retail in the relevant period. This was the first civil antitrust claim asserted against defendants by a retail drug store.

7.

On September 18, 1967, American Medical Enterprises, which had hospitals in California, commenced an action against defendants in the Central District of California (67-1365-R; after transfer here, 68 Civ. 4543). The Schwartz firm represented American Medical Enterprises. The claim was stated for a class of all private hospitals in California who bought and resold or dispensed antibiotics to their patients in the relevant period. This was the first civil antitrust claim asserted against defendants by a private hospital.

8.

On October 23, 1967, trial of the indictment began in this Court before Judge Frankel.

On October 25, 1967, the State of Florida commenced an action in this Court (67 Civ. 4143). The Shapiro firm was of counsel. The claim was for a class of all CCS entities in Florida which had bought antibiotics during the relevant period or had paid for antibiotcs under welfare, old age or other relief programs.

On December 29, 1967, the jury brought in a verdict of guilty against the three defendants named in the indictment.

B. Commencement of Actions After Verdict in the Criminal Case Until the February 6, 1969 Settlement Offers of Defendants

• • • •

[Description of the Various Cases]

• • • •

II. Summary of the Actions Commenced Through February 6, 1969

The class actions commenced through February 6, 1969 and with which we are concerned may be divided into three groups: (A) by CCS entities, for public hospitals and in a number of actions for individual consumers; (B) by retail and wholesale druggists for a class of retail and wholesale druggists; and (C) by private hospitals for a class of private hospitals, both non-profit and proprietary.

A. Actions by CCS Entities

By February 6, 1969, 44 actions had been commenced by CCS entities (one of which was by way of counterclaim).

Shapiro represented the largest number of these, twenty: Alabama, Florida, Georgia, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Virginia and Wisconsin; Cities of New York (counterclaim plaintiff) and Memphis.

Freeman represented plaintiffs in nine of the CCS actions: Colorado, Illinois, Indiana, Michigan, New Hampshre, Pennsylvania, West Virginia; City of Chicago; Metropolitan Government of Nashville and Davidson County.

Goldberg represented plaintiffs in eight of the CCS actions: Connecticut, Idaho, Maryland, New Jersey, New Mexico, and Wyoming; City and County of Denver; Mayor and City Council of Baltimore.

Kohn represented the plaintiffs in one of the CCS actions, that commenced by the City of Philadelphia and City of Detroit (see (11) above). The State of Delaware, the County of Erie (New York), and the Cities of Cleveland and Akron, Ohio, had moved to intervene in this action.

In three of the CCS actions—those by Arkansas, New York, and South Carolina—the plaintiffs were represented by their respective Attorneys General.

In the remaining three of the CCS actions—those by Boston, Maricopa County and Puerto Rico—the plaintiffs were represented by private counsel.

B. Actions by Wholesale and Retail Druggists

By February 6, 1969, eleven actions had been commenced by retail drug stores and by wholesale druggists (one of which was by way of counterclaim).

The Ben Schwartz firm represented the plaintiff in one action and the counterclaiming defendant in another action.

Two of the actions, those begun in or removed to the Southern District of Florida, were duplicative.

In the other actions, separate privately retained attorneys represented the plaintiffs in each action.

Freeman represented the plaintiff in one such action (see (33) above), but withdrew by permission in an order filed April 11, 1969.

Leo Schwartz represented the plaintiff in one such action; he also represented the City of Boston, a plaintiff in one of the CCS actions (see (15) above).

Except as indicated, no lawyer for a plaintiff in the actions by druggists was acting for a plaintiff in a CCS action. Kohn—who represented plaintiffs in one CCS action—later appeared for plaintiffs in a class action for

retail drug stores commenced on March 26, 1969 (see (83) within).

C. Actions by Private Hospitals

By February 6, 1969, fifteen actions had been commenced by private hospitals. One of these (see (60) above) did not state any claim for a class.

Two of the actions, those begun in or removed to the Southern District of Florida, were duplicative. They also combined in one action claims for a class of drug stores and for a class of private hospitals; these claims were later severed from each other.

Kohn represented plaintiffs in one of the private hospital actions (see (19) above).

III. Negotiation of the February 6, 1969 Settlement Offers of Defendants

The defendants made and announced their settlement offers on February 6, 1969. There were two separate offers:

(1) an offer of $100,000,000 in settlement of all claims of CCS entities, wholesalers, retailers, and individual consumers; and

(2) an offer of $20,000,000 in settlement of all claims of private hospitals, of all claims of entities who reimbursed private hospitals, and of all other claims (except those covered by the $100,000,000 offer).

It seems reasonably clear that the $100,000,000 offer was principally negotiated by Shapiro (and Galligan is understood to be included in a reference to Shapiro), with considerable assistance from Freeman, and with some assistance from Goldberg and Kohn.

The impression made by Kohn's petition is that he alone negotiated the settlement offers, that he was forced by defendants to keep the negotiations confidential from

other counsel for plaintiffs, that Kohn proposed the technique of settlement, and that in September 1968 "counsel for defendants informed [Kohn] they had decided his proposals were feasible and had been favorably considered by them" (petition, p. 7). This impression is not believed to be in accord with the facts. While Kohn may have greatly helped to induce defendants to make the settlement offers, others also helped to achieve this result and the contributions of others, notably Shapiro and Freeman, are believed to have been greater than that of Kohn.

Kohn appears to have begun settlement discussions with Stewart (of counsel to Pfizer) on February 28, 1968 and to have continued these during the months through September 1968. Kohn appears to have concentrated on Pfizer.

Shapiro began to discuss settlement with McDonald (of counsel to Cyanamid) on April 12, 1968 and to have continued such talks through September 1968. Shapiro appears to have concentrated on Cyanamid.

A major obstacle to settlement was raised by Cyanamid counsel with Shapiro. This was the effect on the "passing-on" defense of the decision in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231, handed down on June 17, 1968. This caused Cyanamid to fear claims of wholesale and retail druggists and to insist not only that these be specifically included in any settlement but that their impact be diminished.

It was Shapiro who overcame this obstacle. In September 1968, he developed theories of law supporting claims of the CCS entities as parens patriae for individual consumers in their areas and by such CCS entities as class representatives for a class of individual consumers. A memorandum on these theories was sent by Shapiro to Cyanamid counsel under date of October 8, 1968. These theories have also already been noted in the action commenced by Kentucky[1]

[1] Shapiro was counsel in this action.

on November 12, 1968 (see (41) above); they appeared in other actions commenced thereafter and they appeared by amendment in actions earlier commenced. See in this connection Hawaii v. Standard Oil Co. of Calif., 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972).

Kohn appears to have proposed one settlement offer by defendants of all the claims, of whatever character—CCS entities, wholesalers, retailers, consumers, private hospitals and every other kind of claimant; according to Shapiro, this was "the concept of a global settlement" (Dec. 1, 1971 affidavit, p. 44). Shapiro, Freeman and others opposed this; they insisted that there should be a separate settlement with CCS entities. What evolved was something different from the Kohn "global settlement" and not quite what Shapiro and Freeman were urging. The $100,000,000 offer was for all CCS, wholesaler, retailer and consumer claims; the $20,000,000 offer was for all private hospital and all other claims.

Information about the settlement negotiations from the side of the defendants comes from an affidavit, sworn to March 19, 1970, of Roy W. McDonald, Esq., of counsel to Cyanamid. Mr. McDonald says that the settlement meetings in which he and his firm participated were "predominantly" with Shapiro and Galligan, that Freeman was present "on numerous occasions", that Goldberg and Kohn were present "at some of these meetings", and that Goldberg and Kohn were each present "at one or more conferences with defense counsel" at which Shapiro, Galligan and Freeman were not present. Mr. McDonald further tells us that between October 15, 1968 and February 1, 1969 there were 15 meetings about settlement with Shapiro and Galligan, that Freeman was present at 10 of these, that Kohn was present at 3, and that Goldberg was present at 2; McDonald also says that there were "three additional meetings" with Kohn (presumably it was at these meetings

that the agreement between defendants and Kohn was worked out).

According to Kohn, "counsel for defendants" in September 1968 agreed that Kohn could inform Shapiro of the "progress of the negotiations" and invite Shapiro to join in "the settlement" for his (Shapiro's) clients. If this is a suggestion that there was a "settlement" in September 1968 and that Kohn had caused it, the suggestion must be rejected in both aspects. It may be that in or shortly after September 1968, there was a merger of the Kohn-Pfizer and Shapiro-Cyanamid negotiations. Beginning October 15, 1968, the negotiations for settlement were both broader and more intense; these ended in the February 6, 1969 offers.

* * * *

IV. The Agreement Between the Defendants and Kohn

* * * *

V. Commencement of Private Hospital Actions After February 6, 1969

* * * *

VI. Negotiation of the April 3, 1970 Settlement Offer by Defendants to Private Hospitals

* * * *

VII. Procedural Steps After the April 3, 1970 Settlement Offer, in Private Hospital Actions

* * * *

VIII. Services Performed by Kohn

* * * *

IX. The "Fair and Reasonable Value" of Kohn's Services

The task now presented to the Court is a heavy one. It is to determine the "fair and reasonable value" of the services of Kohn as counsel in the actions of "various plaintiffs" against defendants (February 6, 1969 letter). * * * The parties have not agreed on the "fair and reason-

able value" and thus under the agreement it must be determined by the Court.

• • • •

The problem in an antitrust context is perceptively discussed (and the principal cases collected) by Judge Metzer in Trans World Airlines, Inc. v. Hughes, 312 F.Supp. 478 (S.D.N.Y. 1970), affirmed as part of a final judgment 449 F.2d 51, 79 (2d Cir. 1971), cert. granted, 405 U.S. 915, 92 S.Ct. 960, 30 L.Ed.2d 785 (1972).

Judge Harvey on April 28, 1972 filed a careful opinion on the subject, which opinion among many others has been studied by me. Lindy Bros. etc. v. American Radiator etc., Civ. No. 41774SC (E.D.Pa).

More recently on May 2, 1972, Judge Decker also filed a careful opinion on the subject and his opinion has also been studied by me. Illinois v. Harper & Row, 67 C 1899 (N.D.Ill.).

Our Court of Appeals in TWA v. Hughes, above, cited with approval the discussion in a District Court opinion on which Judge Metzner relied and from which he quoted, namely, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 245 F.Supp. 258, 302 (M.D.Pa. 1965), vacated on other grounds, 377 F.2d 776 (3d Cir. 1967), aff'd in part on other grounds, rev'd in part on other grounds, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). In the District Court opinion just cited, Chief Judge Sheridan lists some of the factors to be considered as these:

"(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,

(2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel,

(3) time and labor spent,

(4) magnitude and complexity of the litigation,

(5) responsibility undertaken,

(6) the amount recovered,

(7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,

(8) what it would be reasonable for counsel to charge a victorious plaintiff."

It may be noted that these factors were being applied in an action tried to the court without a jury where plaintiff was awarded substantial damages after trial. There is no mention of the factor of contingency of compensation which is one also to be considered where it exists.

The Code of Professional Responsibility of the American Bar Association states that factors "to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent."

Whether mentioned specifically hereafter or not, I have tried to take into account the several factors referred to above.

102.

[Enumeration of Petitioners' Hours]

• • • •

103.

Counsel for all plaintiffs in all antibiotics actions had the benefit of extensive government investigations and proceedings, including the indictment returned on August 1961 (see 314 F. Supp. at 714-720).

• • • •

104.

As already indicated, Kohn is accepted as an able and experienced antitrust specialist who has a high standing at the bar. In the settlement negotiations resulting in the February 6, 1969 offers, Kohn "greatly helped", as stated above. But he did not by his own efforts bring about the settlement as to the CCS entities; he was among a number of the contributing causes. As to the February 6, 1969 private hospital settlement offer, Kohn advocated a settlement for this $20,000,000 offer; others later persuaded the defendants to offer $32,500,000.

The great help to the plaintiffs from the prior criminal and other government investigations is a reducing factor to be taken into account in determining the reasonableness of fees for counsel to plaintiffs in these and other similar actions (Code of Professional Responsibility, American Bar Association, Canon 2, EC-2-18, DR 2-106(B) (1)), just as the contingency of the compensation is an increasing

factor also to be taken into account (Code of Professional Responsibility, American Bar Association, Canon 2, EC-2-18, DR 2-106(B) (8)).

Aside from the negotiations with defendants and the concepts employed in them, there appear to have been no novel or difficult questions to which the services were addressed.

105.

The claims of the plaintiffs represented by Kohn were of considerable magnitude and their recovery under the settlements are substantial in amount.

In the City of Philadelphia action, the clients of Kohn will receive some $3,150,000, less whatever is allowed for administrative expenses and for counsel fees and expenses.

In the private hospital cases, the clients of Kohn, it is estimated by him, will receive some $160,000, less allowances as above.

It is not shown how much was recovered by the clients of Kohn in the other actions in which he acted, but it is assumed for present purposes that the recoveries were, or will be, substantial.

Of course, the CCS entity actions in the aggregate involve the recovery of in excess of $80,000,000 and the private hospital actions in the aggregate involve the recovery of in excess of $21,000,000; these figures, however, are no proper measure of a fee to Kohn, if for no other reason because he did not himself create those funds; to the extent that he "greatly helped", this has been taken into account.

106.

The 25% contingent fee agreements to which Kohn was a party have been given consideration but they do not greatly affect my conclusion as to the fair and reasonable value of the services performed. The views expressed by

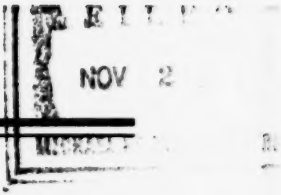
Judge Decker in the *Harper & Row* opinion, above cited, seem to me to be correct:

> "I have some difficulty accepting the premise that a contingent fee contract on a fixed percentage basis will ultimately result in a reasonable and fair fee because some of the plaintiffs have approved it. These contracts are entered into before any services have been performed and generally provide for a fixed percentage fee whenever a case is settled, without any reference to the quality of the services rendered or the time and effort required to effect the settlement. As the size of class action settlements increases, with millions of dollars involved in some cases, the fallacy of adhering to a fixed percentage fee formula becomes more evident."

[2] It is ordered that the fair and reasonable value of the services of Kohn is $600,000.

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SUPREME COURT, U. S.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-562

LOUIS PATLOGAN, formerly doing business as PATLOGAN'S WESTERN PHARMACY, and HARRY RUBENSTEIN, his attorney,

Petitioners,

v.

DICKSTEIN, SHAPIRO & GALLIGAN, now known as COLSON & SHAPIRO, et al.,

Respondents.

Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' REPLY BRIEF

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KEENAN PRINTING COMPANY

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PETITIONERS' REPLY BRIEF

Prefatory Statement

The Respondents, in their opposition brief, clearly have failed or have simply refused to recognize the substance of Petitioners' challenges to the findings of the courts below, and have failed to respond to any of the issues presented therein.

Moreover, an intervening event on October 17, 1973, has destroyed the major rationale of the Lower Courts in denying a fee to Attorney Rubenstein for an admitted monetary accretion to the National Class of Wholesale-Retail Druggists. On that date, in the Federal District Court of Minnesota, the same defendants as in the instant

litigation made a $36 Million settlement with plaintiffs who had opted out of the instant litigation, even though the reversal of the criminal conviction of the defendants remained at the time of this settlement.

I.

BY DENYING FEES TO AN ATTORNEY FOR A MEMBER OF A NATIONAL CLASS BASED UPON PECUNIARY BENEFIT ACHIEVED FOR THAT CLASS, THE LOWER COURTS STIFLED DISSENT, DENIED THE RIGHT OF APPEAL AND DEPRIVED ABSENT CLASS MEMBERS OF THEIR RIGHT TO PROPERTY WITHOUT DUE PROCESS OF LAW AND DESTROYED ADEQUACY OF REPRESENTATION WHICH IS AN ESSENTIAL ELEMENT OF A CLASS ACTION.

Respondents contend that stifling of dissent is not at issue in this appeal, offering as proof that certain dissenting members of the Wholesaler-Retailer Druggist Class (hereinafter referred to as the Druggist Class) were awarded fees based upon their dissent (see Pet. App. A46-A49)). Knowledge of the facts involved show that indeed the opposite is true. Attorneys Berman and Walner, the dissidents to whom respondents refer, did not file under Rule 23 (c) (2) (c), and were among the originally joined parties to the action and members of the Committee of Counsel for the Druggist Class. By order of the District Court, they were removed from the Committee specifically because they dissented, and fees subsequently granted to them were based solely upon the work done by Berman and Walner while members of the Committee, fees being specifically denied for their efforts as dissenters, particularly their joining in the appeal with Attorney Rubenstein that brought the accretion to the Druggist Class of $650,000. (See particularly Pet. App. A47, A49, para. 2). By the removal of Berman and Walner from the Committee, through the denial of fees to these

attorneys for their efforts as dissenters, and in denying fees to Attorney Rubenstein for the increments accruing to the Druggist Class as a result of the first appeal undertaken, the District and Appellate Courts have unmistakenly stifled dissent and therefore it is at issue. If any slogan could be applied to aptly describe the Tetracycline case, it would be "not one cent for dissent".

The Respondents' contention that no benefit accrued to the Druggist Class through the Rubenstein appeal lacks foundation in both law and fact. That appeal was brought by Rubenstein to reverse the District Court ruling which, based upon false affidavits put forth by Respondent Colson & Shapiro, found the Druggist Class to be a nuisance class. These affidavits, of William S. Apple and William Walker, alleging that all druggists uniformly price their prescription drugs 66⅔% over cost, were based solely upon their personal "knowledge and experience" and were not supported by any empirical evidence (see J.A. pp. 220-224). Subsequent to his first appeal, Attorney Rubenstein, in the District Court, in this litigation and in the Ampicillin Antibiotic cases now pending in Washington, introduced proof that there was no such uniform markup, which was then admitted by one of the defendants in the present litigation. The basis of his proof was contained in two independent studies, "Pharmacy Charges for Prescription Drugs" (a statistical survey compiled by R. A. Gosselin and Company, Inc.), and "Prescription Costing and Pricing Methods" (a study by professor S. B. Jeffries, Brooklyn College of Pharmacy). The statistical survey of Gosselin and Company involved professors throughout the United States, including professors from the Harvard Graduate School of Business, and was based on an examination of a half-million prescriptions and 2,600 representative pharmacies throughout the United

States, establishing, conclusively, that there was no such uniform markup. On this basis, the District Court's opinion in the first appeal and the Court of Appeals' opinion in the first appeal, were founded on a false basis of using Shapiro's-Apple's affidavits to establish a cost-plus exception to the *Hanover Shoe* rule of this court. *Hanover Shoe* v. *United Shoe Machine Corp.*, 392 U.S. 481 (1968). So convincing was this proof by Attorney Rubenstein that now, not even the defendants contest the fallacy of the uniform mark-up concept.[1]

Although not available at that time, these proofs indicate that the appeal taken by Rubenstein to overturn the District Court's uniform mark-up ruling was not frivolous and, if successful, would have brought a tremendous increment to the class. With this in mind, it would not be in the best interests of the Druggist Class for Attorney Rubenstein to accept Attorney Shapiro's settlement offer of $650,000 to refrain from appeal when first, that amount was assured his class anyway, if he preserved the appeal beyond November 23, 1970, and secondly, the class stood to gain much more by appeal.[2] Even so, the $650,000 did

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1. It should be noted that it was to this District Judge, whose opinion was established to be erroneous by Attorney Rubenstein, that Attorney Rubenstein had to go for fees for the accretion to the Druggist Class that he achieved by his appeal, in the sum of $650,000.

2. It is to be noted that if Attorney Rubenstein accepted the $650,000, he would have assured himself of a fee. However, the duty to his class in an appeal, the validity of which has now been subsequently established, was the overriding consideration, and the refusal of the Lower Courts to grant him a fee that he was assured of without any extended effort in order to protect his class, defies comprehension and certainly illustrates that he

not come easily. The Respondents herein filed a motion in the Appellate Court attempting to dismiss Attorney Rubenstein's appeal before November 23, 1970, which Attorney Rubenstein successfully argued and won, thereby preserving the appeal and the $650,000 increment to the Druggist Class, which had been abandoned by everyone, including the Committee of Counsel for the Wholesaler-Retailer Class—thus revealing graphically that Attorney Rubenstein was, in effect, acting not in behalf of his own client but in the interests of the National Class of Wholesale-Retail Druggists, which class received the benefit of this accretion and not Attorney Rubenstein's client.

A further argument of Respondents, as well as the lower courts, was that the appeal was not in the best interest of the Druggist Class, the contention being that, in view of the reversal of the criminal convictions of the defendants, the defendants may have walked away from the settlement if the Rubenstein appeal had prevailed. However, as pointed out in Petitioners' Brief, the aim of the appeal was redistribution—not the overturning of the unallocated settlement. In addition, any conceivable validity in this contention has since been nullified by the recent proceedings on October 17, 1973, in In Re Coordinated Proceedings in Antibiotic Antitrust Actions, 4-71 Civil 435 (D.C. Minn. Fourth Division), wherein the same defendants entered into a thirty-six million dollar settlement with those plaintiffs who previously opted out of the consolidated multi-district class action in the instant case —this settlement by the defendants being entered into

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was neither acting for himself nor for his own client, who only would receive a miniscule portion of this substantial accretion and that, therefore, he could only be acting for and in the interests of the National Class of Retail Druggists.

while the reversal of the criminal conviction still stands. This renders the argument of the lower courts for not awarding Attorney Rubenstein a fee for his concrete accretion to the class (which the Appeals Court admitted would have gone to the CCS class) a nullity.

The Respondents fail to come to grips with the issues presented in Petitioners' Brief, among them that by his appeal, Attorney Rubenstein brought a benefit to the Druggist Class of $650,000; that the appeal did not endanger the class because, as evidenced by the proceedings in Minnesota, the defendants were in no position to wash their hands of the settlement, their bargaining position being no better or worse with or without the guilty finding in the criminal action from which this civil action springs; and that the appeal was in the best interests of the Druggist Class since, if successful, it would have increased the allocation to the class by millions of dollars. Further, the only other dissenter was blatantly discriminated against by the District Court, and the denial of fees was just another means by which the District Court denied the right to dissent, and effectively destroyed representation of the absent class members.

The reasoning of the District Court and the Court of Appeals that one who files under 23 (C) (2) (c) is appearing only for his client and not for the class and therefore must be paid by his client, is a novel and damaging statement of law which makes a nullity of the section of Rule 23 which allows absent class members to join an action and actively protect their rights, and consequently the rights of all those absent members. It is inconceivable that one who has a small monetary interest in the outcome of the case could possibly afford the costs of meritorious appeals, or indeed should be forced to sup-

port the burden of an appeal which benefits, not only himself, but all of the members of the class. To do this is not only in contravention of the *Sprague* v. *Ticonic*[3] doctrine, but also makes the "opt out or remain joined" provision of Rule 23 (C) (2) (c) a Hobson's choice, which was neither the purpose nor the intent of the framers of this Rule. In order to insure that joined members be able to protect their rights and also the rights of the absent members, this Court is compelled to grant certiorari.

II.

THE COURT OF APPEALS ERRED IN AFFIRMING A COURT AWARD OF "REASONABLE" ATTORNEY'S FEES TO AN ATTORNEY FOR THE GOVERNMENT ENTITY CLASS FROM THE FUND OF THE WHOLESALER-RETAILER CLASS, WHERE SUCH AWARD AMOUNTED TO DOUBLE COUNSEL FEES AND REWARDED AN ATTORNEY WHERE HIS ANTAGONISTIC CONFLICTING INTERESTS HAD AN INFLUENCE UPON HIS CONDUCT—ALL IN DEROGATION OF EQUITABLE PRINCIPLES.

Respondent's Brief is also unresponsive to the issue of a "reasonable attorney's fee" being awarded to Attorney Shapiro out of the fund of the Druggist Class by the District Court. Attorney Shapiro was retained by the CCS Class members on a contingency fee basis—and yet was awarded the abovementioned "reasonable fees" from the Druggist Class—whose allocation of the global fund it was in the interest of Shapiro to delimit as far as was

3. 307 U.S. 161 (1939).

possible. In his Brief, Respondent continues to maintain the bald assertion that a benefit has been bestowed upon the Druggist Class by the mere creation of the fund. However, such assertion merely begs the question and does not justify the "reasonable" award; and vague reference to the doctrine of *Sprague* v. *Ticonic*[4] does not justify characterizing a victim as a beneficiary.

As stated in Petitioners' Brief, by the demand of the defendants, Attorney Shapiro had no alternative but to include the Druggist Class in the global settlement. That his intent thereafter was always to delimit that inclusion is borne out by both his words and deeds. The affidavits of William Apple and William Walker mentioned earlier in this Reply Brief were the sole cause for the classification of the Druggists as a nuisance class—and these affidavits were presented to the District Court by Attorney Shapiro. In affidavits in objection to Shapiro's award, filed by members of the Committee of Counsel for the Druggist Class, reference is repeatedly made to Attorney Shapiro's inimical attitude towards the Druggist Class. Co-Chairman of the Committee Richard F. Levy stated in his affidavit that:

> "Mr. Shapiro's position throughout these proceedings, as repeatedly communicated to me, has been wholly antagonistic to the interests of the Wholesaler-Retailer [Druggist] Class."[5]

For Attorney Shapiro to now seek shelter under the umbrella of *Sprague* v. *Ticonic* does not seem reasonable. Yet, in Respondent's Brief, an attempt is made to justify the award merely by citing *Sprague* and by quoting at

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4. Supra.

5. See Appendix.

length from the opinion of the Court of Appeals. Therein the Court and Respondent rely upon *O'Hara* v. *Oakland County*[6] as standing for the proposition that the characterization of the CCS Class as an adversary to the Druggist Class does not compel a denial of the award to Shapiro. A reading of that case, however, shows it to be easily distinguishable and clearly inapplicable to the case at bar. In *O'Hara,* appellant attorney asked the court to allow him fair and equitable compensation for his labors which had preserved a fund for adversary-appellee. In that case, however, by circumstances the interests of O'Hara's client and appellee coincided at one point, and appellee conceded that it was the beneficiary of O'Hara's services and that his efforts alone had preserved the fund for appellee. The situation in the instant case is hardly similar—and Petitioners do not consider their class the beneficiary of the labors of Attorney Shapiro, but rather something quite the opposite—namely, the victim.

Respondent, in his brief, correctly contends that the double fee concept, as applied in *Powell* v. *Pennsylvania R. R. Co.*[7] involved collecting twice from the same client for the same services, as a class member and on a private contingency fee contract. A court, in the exercise of its inherent equitable powers, will, of course, deny such a fee arrangement. Petitioners here vigorously advocate an extension of this doctrine to a multi-class action where the classes are competing for an unallocated global fund, so that where the contingent fee of an attorney for one class is increased by his action in lowering the allocation to another class, then his application for a fee from the class whose allocation he reduced, will be considered in

6. 136 F. 2d 152 (6th Cir., 1943).

7. 267 F. 2d 241 (3rd Cir., 1959).

the nature of a double counsel fee and be denied. Such an extension of the *Powell* principle would prevent the "race" by attorneys to negotiate with defendants that might otherwise arise in all multi-class litigation and insure a maintenance of the professional level of advocacy which the public has a right to expect from members of the legal profession.

Nowhere in his opposition brief does Attorney Shapiro meet the issue that the Record revealed that the conflict of his loyalties had a definite influence upon his conduct, namely, to increase his contingent fee while reducing the allocation to the Wholesale-Retail Class and misrepresenting to the representatives of that class the intentions of the defendants, thus placing him in a position of representing conflicting, antagonistic interests for which a court of equity would debar him from receiving any fee whatsoever.[8] (*Woods* v. *City National Bank & Trust Co.*, 312 U.S. 262, 61 S. Ct. 493, 85 L. Ed. 820; *Silbiger* v. *Prudence Bonds Corporation*, 180 F. 2d 917, 920 (2nd Cir., 1950); *cert. denied*, 340 U.S. 813, 71 S. Ct. 40, 95 L. Ed. 597 (1950); *Gesellschaft Fur Drahtlose Telegraphic M. B. H.* v. *Brown*, 78 F. 2d 410, 64 App. D.C. 357 (1935); *DeKorwin* v. *First National Bank of Chicago*, 155 F. Supp. 302, 306 (N.D. Ill. 1957).)

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8. It should be noted again, that only Attorney Rubenstein is acting for the National Class of Wholesale-Retail Druggists to procure the denial to the Shapiro firm of fees from the Wholesaler-Retailer fund. That, in fact, the Committee of Counsel have joined with him in the opposition brief, despite their assertions in the lower court about Shapiro's actions. Their assertion that this is in the best interests of the Druggist Class now is to be considered in the light of the fact that the fees of the Committee of Counsel remain under consideration by the District Court at this time.

CONCLUSION

The equities of the case at bar must compel the Court to grant certiorari. The Respondents in their Brief use no more compelling logic than reliance upon the assertions of an Appellate and District Court who clearly have misapplied the law and misconstrued the facts in this case. The global settlement is not the benefit at issue here. At issue is a hard-fought appeal and the benefit of a $650,000 increment won by virtue of that appeal; the misplacement of fee awards and the denial of others is at issue. These issues have not been properly recognized and have not been addressed to by either the Respondents, the District Court, or the Court of Appeals. These are the bases upon which dissent has been stifled, the right of appeal denied, due process deprived, and equitable powers misused.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX

5. That Attorney Shapiro admitted in his supporting Affidavit that defense counsel would not settle with the government entities unless a method was conceived of structuring the settlement to include the wholesaler-retailer class. This was never revealed to the Committee of Counsel for Wholesalers and Retailers. (See paragraphs 3 and 8 of Attorney Shapiro's supporting affidavit.) This is supported by the fact that the District Judge, in his Order of December 19, 1972, from which this appeal is taken, for the first time on page 38 of his Order and Opinion, states the following:

> "The defendants nevertheless insisted that the claims of the retailer class would have to be settled along with all others, and their February 6, 1969 offer of $100 million so provided."

6. Attorney Shapiro, in order to have the wholesale-retail druggist class declared a nuisance class with a nuisance allocation, procured an affidavit from Dr. Apple that the retail druggists throughout the United States had a uniform mark-up of 66⅔% (which was later proven to be false by Attorney Rubenstein).

7. Attorney Shapiro brought Dr. Apple to a meeting with the Committee of Counsel for Wholesaler-Retailers and sought to have Dr. Apple influence the committee to accept the $3 million allocation.

8. Mr. Ben Schwartz, in a supporting affidavit in opposition to Attorney Shapiro's fees, states that Mr. Shapiro was instrumental in getting Dr. Apple, "the Director of a national druggist association, to circulate to the association members in its bulletin, to discourage them from filing claims".

9. Attorney Cochrane, in his supporting affidavit (Alp. Ind. 90) to the objections to the fees of Attorney Shapiro and his law firm, stated that Mr. Shapiro on many occasions vehemently stated his position to the wholesaler-retailer class representatives that they "should not recover a dime" for their class and further stated that Mr. Shapiro's position was always adamantly antagonistic to the wholesale-retail class as admitted in his own papers.

10. Mr. Richard Levy, co-chairman of the Committee of Counsel for Wholesale-Retail Druggists, in his supporting affidavit to the objection of fees to Attorney Shapiro from his class (Alp. Ind. 90), said the following:

> "Mr. Shapiro's position throughout these proceedings, as repeatedly communicated to me, has been wholly antagonistic to the interests of the Wholesaler-Retailer Class. At one point, Mr. Shapiro indicated that if the Wholesaler-Retailer Class would not accept the $3,000,000, he would 'just as soon let the settlement go down the drain. I am ready to try my case and you're not'."

He said also that Mr. Shapiro said the following:

> "I am under pressure from my clients, the various Attorneys General I represent, to get this money back for them. They are politicians, and they have to have it, and I don't give a damn about the druggists, they're getting too much as it is."

The entire impact of Attorney Shapiro's supporting affidavit is to reveal that, while the defendants were concerned about the implications of the *Hanover Shoe* case and "felt that that decision may weaken their pass-on defense against the druggists", especially since Donovan, Leisure, Newton & Irvine, counsel for one of the defend-

ants in this case, were counsel for the successful party in *Hanover Shoe* (see paragraph 3 of Attorney Shapiro's affidavit)—Attorney Shapiro set upon a course of conduct to procure out of the $100 million settlement, $97 million for his clients and the class of government entities he purported to represent with others, and $3 million for the wholesaler-retailer druggists by preventing the Committee of Counsel for the Druggists from having direct negotiations with the defendants and by intimidating, threatening, seducing and inducing the Committee of Counsel for Druggists to accept what he was offering out of the $100 million global offer.

In fact, as unbelievable as it may seem, one of his threats is set out clearly in the District Court Judge's Order and Opinion of December 19, 1972, in which the District Court Judge says, on page 39:

> "It was stated by Shapiro that if the retailer class accepted the $3 million allocation, Shapiro would not ask a fee against the $3 million."